HM Courts & Tribunals Service and Employment Tribunal decision: Royal Bank of Scotland PLC v AB: UKEAT/0266/18/DA

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London: HM Courts & Tribunals Service and Employment Tribunal has issued the following decision:

 Copyright 2020Appeal No UKEAT/0266/18/DAUKEAT/0187/18/DAEMPLOYMENT APPEAL TRIBUNALROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NLAt the TribunalOn 6, 7, 8 November 2019Judgment handed down on 27th February 2020BeforeTHE HONOURABLE MR. JUSTICE SWIFT(SITTING ALONE)_____ROYAL BANK OF SCOTLAND PLC APPELLANTAB RESPONDENTJUDGMENT_____ _____UKEAT/0266/18/DAUKEAT/0187/18/DAAPPEARANCESFor the Appellant Mr Bruce Carr(One of Her Majesty's Counsel)and Mr Colin Mendoza and MsAlice Carse of CounselInstructed by Brodies LLPFor the Respondent Mr Gerard McDermott(One of Her Majesty's Counsel)and Mr William Young of CounselInstructed by Sternberg ReedSolicitorsUKEAT/0266/18/DAUKEAT/0187/18/DA-1-ABCDEFGHSUMMARYPRACTICE AND PROCEDUREDISABILITY DISCRIMINATIONThis was an appeal against the decision at a remedies hearing, following the conclusion that theemployee had suffered discrimination on grounds of disability. The employee contended she hadsuffered a serious psychiatric injury as a result of the unlawful discrimination which preventedher from working for the foreseeable future and which required round the clock care. TheEmployment Tribunal awarded compensation of £4,670,535 (which the parties are agreed shouldbe altered to £4,724,801 to reflect interest accruing prior to the date of the Employment Tribunal'sJudgment). The employer appealed.The issues in the appeal concerned the Tribunal's decisions on (a) whether it was necessary toassess the employee's capacity to conduct the litigation at the time of the remedies hearing; (b)whether (and to what extent) the psychiatric injury was caused by the discrimination; (c) whetherthe employee had exaggerated her condition; and (d) the sufficiency of the Tribunal's reasons forpreferring the evidence of one expert witness over another.The appeal was dismissed, save in respect of one ground of appeal which concerned theEmployment Tribunal's conclusion that no assessment of the employee's capacity to conductlitigation had been required. The Employment Appeal Tribunal concluded that there was no needto remit the question of assessment to the Employment Tribunal. The failure to assess had notrendered the Employment Tribunal proceedings void, and did not constitute unfairness to theemployer in the conduct of the proceedings amounting to an error of law.UKEAT/0266/18/DAUKEAT/0187/18/DA-2-

ABCDEFGHTHE HONOURABLE MR. JUSTICE SWIFTA. Introduction1. In a Judgment sent to the parties on 12 February 2016 the Employment Tribunal upheldAB's complaint of unfair dismissal against her former employer, the Royal Bank of Scotland plc('RBS'). The Tribunal further concluded that RBS had unlawfully discriminated against AB ongrounds of disability.2. AB worked for RBS from October 2008 until her resignation in May 2014. She wasoriginally employed as a Customer Services Officer at one of RBS's NatWest branches inCroydon, but in the course of her employment she worked at various NatWest branches including,from October 2011, the branch in Stratford where she was a Customer Services Officer.3. In August 2008, on her way to work on the day due to be her first day of employment,AB was knocked down by a car. She suffered significant injuries, including a broken leg, damageto her knee ligaments, and nerve damage. When she was able to start work, two months later,her left leg was in a brace, her left foot in a splint, and she needed to use crutches. Throughouther employment she continued to wear the foot splint and walked with a slight limp. The Tribunalheard evidence that these injuries continued to cause AB pain throughout the period of heremployment, and that this pain affected her ability to work and to be at work. Her continuingdisabilities were such that from November 2008 she was paid Disability Living Allowance,including the mobility element of that benefit. RBS did not dispute that AB's physical conditionamounted to a disability for the purposes of the Equality Act 2010.UKEAT/0266/18/DAUKEAT/0187/18/DA-3-ABCDEFGH4. Further, either the Tribunal concluded or it was common ground that, during the courseof her employment AB came to suffer from a mental illness that amounted to a disability. Duringthe course of her employment AB had two significant periods of sick leave: in July and August2013 when she was absent from work because of "low mood and physical pain"; and then fromthe end of December 2013 until her resignation at the beginning of May 2014 when she wasabsent from work by reason of stress. However, the Tribunal further concluded that RBS couldnot have reasonably been expected to know that by reason of these matters AB suffered from adisability for the purposes of the Equality Act 2010.5. In its liability Judgment the Employment Tribunal concluded that AB had beenconstructively dismissed, and that the dismissal was unfair. The Employment Tribunal foundthat RBS had acted in breach of the obligation to maintain the necessary relationship of trust andconfidence, and in breach of an implied obligation to provide a safe working environment. Sofar as concerns the disability discrimination claim, the Tribunal concluded that discriminationhad taken place: first by reason of a failure to make reasonable adjustments relating to AB's workstation and requiring AB to work on the till in the branch; second by reason of comments madeeither to or about AB on five occasions; and thirdly by reason of a failure to permit AB to transferfrom the Stratford Branch either to the Clapham Branch or the Balham Branch.6. This appeal concerns the Employment Tribunal's conclusions on remedies. The firstremedies hearing commenced on 24 July 2017. That hearing took place between 24 – 28 July,on 7 September 2017, and between 2-3 November 2017. The Tribunal sat in chambers on 6-8 and27 November 2017, and on 21 December 2017. The Tribunal's decision was sent to the partiesUKEAT/0266/18/DAUKEAT/0187/18/DA-4-ABCDEFGH6 March 2018. The issues at the remedies hearing were very significant. AB's contention wasthat in consequence of the discrimination that had occurred she suffered from severe depression.Her case was supported by medical reports from a consultant psychiatrist, Dr Jonathan Ornstein.In his first report, dated 22 July 2016, he diagnosed AB to be suffering from a severe depressivedisorder with psychosis. Given the longevity and severity of AB's symptoms he considered thather prognosis, at least for the foreseeable future, was very poor. His opinion was that AB wasseverely depressed and unable to work, and that he could not foresee whether AB would ever beable to return to work. His conclusion was that the discrimination she had suffered at work wasthe cause of AB's condition. Dr Ornstein provided six further reports for the remediesproceedings, each report reviewing further information that had been obtained as preparation forthe hearing progressed. In his report dated 28 April 2017 he stated conclusions: (a) that ABshowed "severe signs and symptoms of multiple psychiatric disorders, namely severe depression,anxiety and conversion disorders as well as psychosis"; and (b) the "Tribunal and discriminationare the primary causes of the current presentation". In a report dated 4 May 2017 Dr Ornsteinagreed with the conclusion stated in a care report completed on 30 September 2016, that ABrequired on-going, 24-hour care.7. In opposition to those conclusions, RBS relied on evidence prepared by another consultantpsychiatrist Dr Jennifer Stein. She disagreed with many parts of Dr Ornstein's opinion and inparticular she disagreed as to the cause of AB's psychiatric injury, and as to the extent of thatinjury. Thus, it was left to the Tribunal: (a) to decide whether AB's psychiatric condition was theconsequence of the acts of discrimination that had occurred at work, or whether it had been causedby matters pre-dating those events (in particular the road accident that had taken place in AugustUKEAT/0266/18/DAUKEAT/0187/18/DA-5-ABCDEFGH2008); and (b) to resolve the disputes of evidence as to the extent of the psychiatric injury fromwhich

AB suffered.8. The damages claimed by AB were significant. The value of the claim was summarisedat paragraphs 12 and 87 of the Tribunal's First Remedies Judgment and was in excess of £10.5million. By far the largest single element was the claim for the cost of future care and assistancewhich was put at £9.9 million. In its First Remedies Judgment the Employment Tribunal set outits conclusions on the issues of principle, namely causation, whether AB had exaggerated herpsychiatric symptoms, the level of the award of damages to be made for pain suffering and lossof amenity, and the amount of damages to be awarded in respect of the cost of future care (on theassumption that the conclusion on causation permitted such damages to be recovered at all). TheEmployment Tribunal then left it to the parties to seek to agree the sum payable based on theconclusions it had set out. In case of default of such agreement, the Tribunal listed a furtherhearing for 27 and 28 March 2018. As it turned out, the parties were not able to agree all mattersand the hearing listed in March 2018 did take place. This resulted in a Second RemediesJudgment which was sent to the parties on 9 April 2018. The overall outcome of the remediesproceedings was an order that RBS pay AB damages in the amount of £4,670,535. The partiesare agreed that pre-judgment interest in the amount of £54,266.20 should be added to the figureprovided in the Tribunal's order. I am told that the Tribunal has been informed of this but has notyet issued a revised order. When that order is issued, the parties agree that it should record theamount payable as £4,724,801.9. Each of the Remedies Judgments was the subject of a Notice of Appeal. Taken togetherthe grounds of appeal contained in the Notices were as follows:UKEAT/0266/18/DAUKEAT/0187/18/DA-6-ABCDEFGHFirst Remedies JudgmentGround 1. The Employment Tribunal erred by failing to adjourn the hearing for formalassessment of AB's capacity to conduct the litigation, and to give evidence.Ground 2. Having concluded that no assessment of AB's capacity to conduct litigation wasrequired, the Employment Tribunal should have concluded that AB's failure to give evidenceat the remedy hearing indicated that she had exaggerated her psychiatric ill-health.Ground 3. The Employment Tribunal had wrongly failed to reconsider its decision not toadjourn pending assessment of AB's capacity to litigate.Ground 4. The Employment Tribunal should have reduced the amount payable to AB to takeaccount of the possibility that her psychiatric condition would have occurred in any event byreason of her pre-existing vulnerability and other psycho-social stressors.Ground 5. The Employment Tribunal failed to give sufficient reasons to explain why itpreferred the evidence of Dr Ornstein to the evidence of Dr Stein.Ground 6. The Employment Tribunal was wrong to calculate the award it made for the costof past care on the basis of the aggregate rate.UKEAT/0266/18/DAUKEAT/0187/18/DA-7-ABCDEFGHSecond Remedies JudgmentGround 1. That the Employment Tribunal had misapplied the provisions of the SocialSecurity (Recovery of Benefits) Act 1997, with the consequence that the damages awardedto AB for past loss of earnings and future loss of earnings had included an element of doublerecovery.10. At the beginning of the hearing of the appeal Mr Carr QC stated that RBS no longerintended to pursue the single ground of appeal against the Second Remedies Judgment. In thecourse of the hearing RBS abandoned Ground of Appeal 6 of the appeal against the FirstRemedies Judgment. (At the hearing before me, RBS was represented by Mr Carr QC MrMendoza and Miss Carse. At the Employment Tribunal hearing RBS was represented only by MrMendoza and Miss Carse.)B. Decision(1) Grounds of Appeal 1 and 311. These grounds of appeal are directed to the Employment Tribunal's conclusion that it wasnot necessary to assess whether AB had capacity to conduct the litigation as at the time of theremedies hearing.12. AB was due to give evidence on 24 July 2017, at the beginning of the remedies hearing,but did not do so. The Employment Tribunal was told she was not able to give evidence that dayas she was not able at that time to give instructions. AB's counsel Gerard McDermott QC toldUKEAT/0266/18/DAUKEAT/0187/18/DA-8-ABCDEFGHthe Tribunal that he needed to speak to AB further to determine whether she would be able togive evidence. That being so, the remedies hearing started with the evidence of Dr Ornstein,which lasted until lunch the next day, 25 July 2017. After lunch on 25 July, AB came into thehearing room. In its Judgment, the Employment Tribunal records that when AB was askedquestions by Mr McDermott."… her response was unintelligible. She did not appear to recognise Mr. McDermott.Her responses to the very simple questions he put to her were sounds and grunts, notwords. Her presentation was similar to that described by Dr. Valentine and shown in therecording he had taken of a part of his interview with [AB] and which was watched in thecourse of this remedy hearing"Dr Valentine is a Consultant in pain medicine. He had provided a report for the proceedingsdated 27 May 2017. In that report he set out how AB had acted when she was examined by himon 5 April 2017."[AB] presented with her back to me. She was observed to perform a variety ofmovements throughout the assessment, for example, she was observed to slap herself,scratch herself, and rock to and from. She communicated broken/stuttering speechaccompanied by other non-verbal vocalisations."Mr McDermott QC and Mr. Young, who acted for AB in the Employment Tribunal proceedingsand act for her in this

appeal, accepted Mr Carr's description that AB's presentation at theEmployment Tribunal was "shocking". The Employment Tribunal explains in its Judgment thatMr McDermott then informed it that he would not be calling AB to give evidence.13. The first and third grounds of appeal arise out of the decisions taken by the EmploymentTribunal in the face of this state of affairs. RBS applied to the Employment Tribunal for an orderrequiring an assessment of whether AB had capacity to conduct the Tribunal proceedings. If theresult of that assessment had been that AB did not have capacity, it would have been necessaryUKEAT/0266/18/DAUKEAT/0187/18/DA-9-ABCDEFGHfor a litigation friend to have been appointed to conduct the proceedings on her behalf. TheEmployment Tribunal heard submissions on this application from RBS during the afternoon of25 July 2017, and submissions from Mr McDermott on behalf of AB the following morning.Later the same morning (26 July 2017) the Employment Tribunal refused RBS's application. TheTribunal stated the reasons for its decision, orally. The written reasons for the decision are atparagraphs 17 - 26 of the First Remedies Judgment. The Employment Tribunal referred to thepresumption at section 1(2) of the Mental Capacity Act 2005 that a person is to be assumed tohave capacity "unless it is established that he lacks capacity", and also to sections 2 and 3 of the2005 Act. At paragraph 26 of the Judgment the Employment Tribunal said as follows as to whyan assessment of AB's capacity to conduct the litigation was not necessary."26. After giving consideration to the representatives' helpful submissions the Tribunalconcluded that the presumption [of] capacity had not been displaced and refused theRespondent's application for the case to be stayed in order for a formal assessment to bemade including for the following reasons:26.1 The Claimant's legal team were satisfied that they could obtain thenecessary instructions from their client and continue with these proceedings.26.2 This is a case where the Claimant has a QC that has been recently instructed.She has a junior, Mr. Young, who has been representing the Claimant over a long liabilityhearing and numerous Preliminary Hearings.26.3 The Claimant has had solicitors who have been representing her for years.26.4 The instructions that the Claimant's lawyers take from the Claimant areprivileged. They are satisfied that they are able to continue to act for the Claimant.26.5 Dr Ornstein has given a recent assessment of the Claimant's capacity, basedon meeting her April 2017, in which he has given his view that the claimant has thenecessary capacity.26.6 Neither of the psychiatric experts present in this Tribunal had notified theTribunal that their professional opinion is that the Claimant does not have capacity.26.7 The presumption of section 1 of the Mental Capacity Act, that an individualhas capacity to act has not, therefore, been displaced and the application was refused."14. The Order recording the Employment Tribunal's decision that it was not necessary toassess AB's capacity to litigate was sent to the parties the next day, 27 July 2017. Paragraph 1of that Order states that "the Respondent's application for these proceedings to be stayed isUKEAT/0266/18/DAUKEAT/0187/18/DA-10-ABCDEFGHrefused". That may not properly reflect the substance either of the application made to theTribunal or the Tribunal's decision. However, it is common ground before me that this paragraphof the Order records the Employment Tribunal's decision that no assessment of AB's capacity tolitigate was necessary.15. Late in the afternoon on 27 July (the fourth day of the hearing), RBS asked theEmployment Tribunal to reconsider whether an assessment of AB's capacity to litigate wasrequired. Submissions in support of this application were made on the morning of 28 July 2017.RBS described the application either as an application to reconsider the decision given on 26 July2017, or as a new application for assessment of AB's capacity to litigate. RBS contended thatnew information was available in the form of a note prepared by Dr Stein dated 27 July 2017. Inthat note, Dr Stein set out observations on AB's presentation at the Employment Tribunal hearingon the afternoon of 25 July 2017. The essence of the note was that if the way AB presented wasaccepted at face value, it gave rise to grounds for doubting her decision-making capacity.16. The Tribunal rejected the application. It gave oral reasons for its decision, which weresubsequently set out at paragraphs 40 – 52 of the First Remedies Judgment. The EmploymentTribunal's starting point was that it should only revisit its decision on capacity if there had beena material change of circumstances. It concluded that the contents of Dr Stein's note did notreveal any such change in circumstances. At paragraph 49 the Tribunal stated as follows."The evidence of Dr Stein was the confirmation or elaboration of some of the evidenceshe, as the Respondent's expert witness, had given. Nor at any point had she given anyopinion that the Claimant does not have capacity, even although it was something MrMcDermott had specifically asked her to do when drafting an additional statement beforeshe gave evidence."UKEAT/0266/18/DAUKEAT/0187/18/DA-11-ABCDEFGH17. The Employment Tribunal then went on to point out that the matters set out in Dr Stein'snote either could have been made earlier in support of the application made on 25 July 2017, oralternatively that the earlier application should have been delayed and not made until the notewas available. The Employment Tribunal concluded as follows, at paragraph 52."In short, the application to

have the Tribunal's Case Management Order set asideappears to have no merit and to be illustrative of having a confrontational approach tothe litigation. The Tribunal's original reasons in the decision it made held good, therehad been no material change in the circumstances, finality in litigation is important, andthe impression given was the Respondent's representatives did not like the Tribunal'sdecision, were piqued by it and wanted to try to bully the Tribunal into making anotherdecision to its liking."18. What is said in this paragraph of the Judgment is striking. In this regard, it is notable thatthe first 82 paragraphs of the First Remedies Judgment comprised rulings on interlocutoryapplications. Read at the remove of an appeal hearing conducted a little over two years later,paragraph 52 of the Judgment suggests a fractious situation in which the usual bonds of mutualrespect between the parties and the Tribunal – essential to the conduct of litigation – were understrain. Managing claims that are out of the ordinary can be difficult. This case was in that classbecause of the very significant consequences, as alleged by AB, of the discrimination she hadsuffered. Even when as in this case parties are professionally represented, the way in whichcomplex and difficult cases are conducted can cross the line between hard-fought andunnecessarily confrontational. It is plain from any reading of the First Remedies Judgment thatthe Employment Tribunal considered that line had been crossed, in particular by RBS. Yet inexpressing itself in the way that it did at paragraph 52 of its Judgment, the Tribunal also crosseda line that ought not have been crossed. All involved in litigation, including and in particular theTribunal, must do their upmost to create and maintain a constructive environment in whichapplications can be raised, considered, and determined without exasperation. If a Tribunalconcludes that applications made to it are repetitious and for that reason without merit, it shouldUKEAT/0266/18/DAUKEAT/0187/18/DA-12-ABCDEFGHsay so, and say it clearly. But the Tribunal's statement that it was being "bullied" suggests it hadlost sight that it was its responsibility alone to control the proceedings. The notion that a tribunalor court is being "bullied" by litigants is a misuse of language. The observations made by theTribunal at the end of paragraph 52 are regrettable and ought not to have formed part of theJudgment. Be that as it may, those observations do not go to any point of substance in this appeal.I will now address the grounds of appeal.19. Ground of Appeal 1 is that the Employment Tribunal should have required an assessmentof AB's capacity to conduct the litigation to have been undertaken. This is directed to the decisiongiven orally on 26 July 2017 and contained in the Order sent to the parties on 27 July 2017.Ground of Appeal 3 is directed to the decision announced on 28 July 2017 not to revisit the earlierdecision that there was no need to assess AB's capacity to conduct the litigation. AB opposesboth these grounds of appeal on their merits. In addition, she submits that Ground of Appeal 1is time barred. The time point is as follows: the Order containing the 26 July 2017 ruling on theneed for a capacity assessment was sent to the parties on 27 July 2017; by Rule 3(3)(b) of theEmployment Appeal Tribunal Rules 1993 any appeal against an order of an EmploymentTribunal is to be served on the Employment Appeal Tribunal 42 days from the date of the Order;in this case the 42 day period ran to 5 September 2017; but the Notice of Appeal was not receivedby the Employment Appeal Tribunal until 24 April 2018. No corresponding time point arises inrespect of the Employment Tribunal's decision on 28 July 2017 since that was not the subject ofa separate Order. So far as concerns that decision, time to appeal started to run on 6 March 2018when the First Remedies Judgment was sent to the parties. I will consider the time point afterconsidering the substantive merits of the first and third grounds of appeal.UKEAT/0266/18/DAUKEAT/0187/18/DA-13-ABCDEFGH20. Where a person lacks capacity to conduct litigation in the High Court, the court mayappoint a litigation friend to conduct the litigation on the person's behalf: see CPR Part 21. Thispower is distinct from the power of the Court of Protection under section 16 of the MentalCapacity Act 2015 to appoint a Deputy to take decisions on behalf of any person who lackscapacity. If appointed, and subject always to the extent of the terms of appointment, a Deputymay conduct litigation on behalf of the person who lacks capacity.21. The events of this Tribunal hearing on 25 to 26 July 2017 came before the judgment ofthe Employment Appeal Tribunal in Jhuti v Royal Mail Group Ltd [2018] ICR 1077 washanded down, on 31 July 2017. In Jhuti, the Employment Appeal Tribunal concluded that anEmployment Tribunal did have power, under Rule 29 of the Employment Tribunals Rules ofProcedure 2013, to appoint a litigation friend. In reaching this conclusion the EmploymentAppeal Tribunal departed from its earlier judgment in Johnson v Edwardian InternationalHotels Ltd (2 May 2008 – the decision then being that an Employment Tribunal did not have thepower appoint a litigation friend). Recognition of an Employment Tribunal's power to appoint alitigation friend is not a matter that was critical to the Employment Tribunal's decision in thiscase. The only question for the Tribunal raised by the application made by RBS on 25 July 2017was whether the Employment Tribunal needed to pause its proceedings to permit assessment ofAB's capacity to conduct litigation to take place. Prior to the judgment in Jhuti any suchassessment and any orders consequent

upon it, would have been for another court, mostly likelythe Court of Protection. I mention the judgment in Jhuti and the earlier judgment in EdwardianInternational Hotels only to indicate that, as at the time of the decision of the EmploymentTribunal in this case, the position, in Employment Tribunal proceedings, of litigants who lackedcapacity to litigate, was not entirely straightforward.UKEAT/0266/18/DAUKEAT/0187/18/DA-14-ABCDEFGH22. Nevertheless, my conclusion is that in this case the Employment Tribunal was wrong toconclude that an assessment of AB's capacity to litigate was not necessary. It is right that anyTribunal must take care before concluding that assessment of a litigant's capacity to litigate isnecessary. Simler P's words of warning, at paragraph 38 of her judgment in Jhuti, are important.Tribunals must not permit arguments about litigation capacity to be used discriminately orunscrupulously. The risk of misuse must be carefully policed. However, where there is legitimatereason to doubt a litigant's capacity to litigate, that issue must be addressed. A litigant who lacksthe capacity to litigate lacks the ability fairly to participate in legal proceedings. It is unfair topermit proceedings to continue in those circumstances until that litigant's interests are properlyrepresented whether by a litigation friend or a court-appointed Deputy.23. The way AB presented to the Employment Tribunal on the afternoon of 25 July 2017 didprovide reason to suspect that she might not have had capacity to conduct the litigation. She didnot appear to recognise her counsel; and she appeared unable to respond to simple questions.Although it is true that the presumption of capacity at section 1(2) of the 2005 Act can only bedisplaced by evidence that establishes a lack of capacity, the issue for the Employment Tribunalon 25 - 26 July 2017 was not to decide whether AB lacked capacity but whether there was goodreason for concern that AB might lack capacity such that an assessment was required.24. In reaching its decision that no such assessment was required, the Employment Tribunalrelied on four matters: (a) the view of AB's lawyers that they were satisfied they were able tocontinue to act for AB; (b) the views of Dr Ornstein in a report dated 21 July 2017; (c) the factUKEAT/0266/18/DAUKEAT/0187/18/DA-15-ABCDEFGHthat neither Dr Ornstein or Dr Stein had notified the Employment Tribunal that their opinion wasthat AB lacked capacity; and (d) and the presumption at Section 1 (2) of the 2005 Act.25. Reasons (a) and (c) do not withstand scrutiny. Dr Ornstein's capacity report dated 21 July2017, even though written a matter of days before the remedies hearing commenced (on 24 July2017), was written only on the basis of Dr. Ornstein's prior engagement with AB. The last timehe had examined AB was on 28 April 2017. More importantly Dr Ornstein had not been presentat the Tribunal on the afternoon of 25 July 2017. Next, the Tribunal's reliance on the absence ofa report from either Dr Ornstein or Dr Stein stating an opinion that AB lacked litigation capacitywas illogical. As the Tribunal ought to have realised, neither Dr Ornstein nor Dr Stein had hadthe chance to examine AB or express an opinion in light of events of the afternoon of 25 July2017. Moreover, this part of the Tribunal's reasoning indicates that it was failing to address theright question. The question at this stage was not whether AB lacked capacity to litigate butwhether there was a permissible basis for enquiries to be made as to whether she lacked thatcapacity. Taken together, these points entirely undermine the Tribunal's reliance on the viewsexpressed by AB's lawyers that they were "able to continue to act for AB". Given the way thatAB had presented at the Tribunal hearing, and the obvious concern her lawyers had previouslyhad in respect of capacity, which had led them to obtain Dr Ornstein's capacity report of 21 July2017, and the lack of an up to date expert opinion, the Tribunal placed more weight on theassertions of AB's lawyers than those assertions could rationally bear.26. This leaves the Tribunal's reliance on the section 1(2) presumption of capacity. Thepresumption of capacity is important; it ensures proper respect for personal autonomy byrequiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2)UKEAT/0266/18/DAUKEAT/0187/18/DA-16-ABCDEFGHpresumption like any other, has logical limits. When there is good reason for cause for concern,where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoidtaking responsibility for assessing and determining capacity. To do that would be to fail to respectpersonal autonomy in a different way. As Simler P pointed out in Jhuti, a litigant who lackscapacity is effectively unrepresented in proceedings since she is unable to take decisions on herown behalf and unable to give instructions to her lawyers. Thus, although any Tribunal should bealert to guard against attempts by litigants to use arguments about capacity improperly, if,considered objectively, there is good cause for concern that a litigant may lack litigation capacity,an assessment of capacity should be undertaken. What amounts to "good cause" will alwaysrequire careful consideration, and it is not a conclusion to be reached lightly. For example, goodcause will rarely exist simply because a Tribunal considers that a litigant is conducting litigationin a way with which it disagrees, or even considers unreasonable or vexatious. There is likely tobe no correlation at all between a Tribunal's view of what is the "common-sense" conduct of apiece of litigation and whether a litigant has capacity to conduct that litigation. Somethingqualitatively different is required.27. In this case, the Tribunal's reliance on section

1(2) of the 2005 Act was in error. TheTribunal relied on the section 1(2) presumption to create Catch-22: a conclusion that anassessment of AB's capacity to litigate would only be appropriate if there was already expertevidence that she lacked capacity to litigate. That was a misapplication of section 1(2) of the 2005Act. Section 1(2) does require any lack of capacity to be "established"; but it does not require alack of capacity to be established before a court can require an assessment of capacity. Thatproposition only has to be stated to be recognised as self-defeating. In the present case, the onlyissue for the Tribunal raised by RBS's application was whether there was good cause for concernUKEAT/0266/18/DAUKEAT/0187/18/DA-17-ABCDEFGHthat AB might lack capacity to conduct the litigation. In this case good cause for concern plainlydid exist. The Tribunal ought to have concluded that an assessment of AB's capacity to conductthe litigation should have been undertaken.28. I now turn to Ground of Appeal 3, the challenge to the Tribunal's decision on 28 July2017 not to revisit its decision that there was no need for assessment of AB's capacity to conductthe litigation. There was some debate before me as to whether the application that led to thedecision of 28 July 2017 was reconsideration of a "judgment" under Rule 70 of the EmploymentTribunal Rules, or reconsideration of a "case management order" under Rule 29 of theEmployment Tribunal Rules. I am satisfied that the relevant power exercised by the Tribunalwas the power under Rule 29.29. Rule 1(3) of the Employment Tribunal rules defines "case management order" and"judgment" as follows:"(3) An Order or other decision of the Tribunal is either –(a) a "case management order", being an order or decision of any kind inrelation to the conduct of proceedings, not including the determination of any issuewhich would be the subject of a judgment; or(b) a "judgment", being a decision made at any stage of the proceedings (butnot including a decision under Rule 13 or 19), which finally determines –(i) a claim, or part of a claim, as regards liability, remedy or costs(including preparation time and wasted costs);(ii) any issue which is capable of finally disposing of any claim, or partof a claim, even if it does not necessarily do so (for example, an issuewhether a claim should be struck out or a jurisdictional issue);(iii) the imposition of a financial penalty under Section 12A of theEmployment Tribunals Act."30. Rule 70 applies only in respect of "judgments". It is clear that the Tribunal's decision of26 July 2017, evidenced by the Order sent to the parties on 27 July 2017, was not a decisionUKEAT/0266/18/DAUKEAT/0187/18/DA-18-ABCDEFGHfinally determining a claim or part of a claim. Nor was it a decision on an issue that was capableof finally disposing of a claim. RBS submitted that had its application succeeded it would havebought the proceedings to an end. That submission is wrong. Had the Employment Tribunalallowed RBS's application, the proceedings would have been held in abeyance for a short periodpending determination of AB's capacity, and if necessary, the appointment of a litigation friend.That is all. The purpose of an assessment of capacity to litigate is to determine the conditions inwhich litigation may proceed, not to bring it to an end.31. For these reasons, Rule 29 was the relevant provision in the Employment Tribunal Rulesfor the purposes of the decision made by the Tribunal on 26 July 2017. Under Rule 29 a Tribunalmay vary a case management order "where it is necessary in the interest of justice". Ordinarily,this Appeal Tribunal will exercise caution when considering appeals against decisions takenunder Rule 29, and will intervene only if the Employment Tribunal has erred in principle or hasreached a conclusion beyond the limits of mere reasonable disagreement.32. In this instance the Tribunal's decision on 28 July 2017 under Rule 29 was outside thegenerous ambit of discretion properly to be afforded to it. Part of the reasons for the Tribunal'sdecision on 26 July 2017 refusing RBS's application that AB's capacity to litigate be assessedwas that neither Dr Ornstein nor Dr Stein "had notified the Tribunal that their professionalopinion is that [AB] does not have capacity". The logical inference from that was that theTribunal would consider the need for assessment further, on the basis of appropriate furtherevidence. Yet in the circumstances of this case that possibility created the risk of anomaly in thatit was unlikely that either Dr Ornstein or Dr Stein could properly opine on AB's capacity tolitigate without the opportunity to examine her. RBS's application for reconsideration wasUKEAT/0266/18/DAUKEAT/0187/18/DA-19-ABCDEFGHsupported by the note from Dr Stein dated 27 July 2017. As I have already said, that notecontained Dr Stein's observations on the events of the afternoon 25 July 2017. One point madewas that any formal assessment of capacity would need to be based on more than her observationsof AB that afternoon. That, it seems to me, was an entirely appropriate point to make. Thus,although Dr Stein's note of 27 July 2017 was not the "the professional opinion" on a lack ofcapacity the Tribunal had referred to, it did explain that any such opinion could only be formedon the basis of further assessment. The Tribunal's reasoning, at paragraphs 48-52 of theJudgment, does not engage with this at all. Rather, the Tribunal, refused the Rule 29 applicationdescribing it as "without merit" on the basis that, among other matters, Dr Stein had not "givenan opinion that [AB] does not have capacity". This reasoning only serves to perpetuate theCatch-22 I have described earlier: the Tribunal was not prepared to revisit its earlier decision thatthe

assessment of AB's litigation capacity was not necessary because it did not already haveexpert evidence that would (or at least might) conclusively show that AB lacked capacity tolitigate. This approach was irrational. Any Tribunal properly applying its mind to the situationought to have realised that the opinion it regarded as a precondition for assessment could onlyarise from the process of assessment itself.33. I now consider AB's submission that Ground of Appeal 1 is time-barred. My conclusionis that this ground of appeal is time-barred. Ground of Appeal 1 is directed to the Order of theTribunal sent to the parties on 27 July 2017. That was when the 42-day period for instituting anappeal commenced. The appeal against the 27 July 2017 Order was not commenced in time.RBS, relies on Rule 37 of the Employment Appeal Tribunal Rules 1993 and on the judgment inUnited Arab Emirates v Abdelghafar [1995] ICR 65, and submits that time for instituting theappeal should be extended.UKEAT/0266/18/DAUKEAT/0187/18/DA-20-ABCDEFGH34. The material part of Mummery P's judgment in Abdelghafar is at pages 70A to 72C. Insummary this is to the following effect. First, whether or not to grant an extension of time is amatter of judicial discretion, the exercise of which must take account of all relevant matters.Second, where the extension of time is sought in order to institute an appeal, the relevantconsiderations include the public interest in certainty and finality of legal proceedings, with theconsequence that the need to comply with a time limit is more important and an application toextend time may be refused even though the applicant's default has not caused prejudice to theother parties to the proceedings. Third, any party seeking an extension of time must provide a"full, honest and acceptable explanation of the reasons for the delay". The grant of an extensionof time to institute an appeal is an exceptional step. What amounts to good excuse is to beassessed in that context. Fourth, if good excuse for the delay does exist that should be consideredtogether with any other relevant matters to access whether the extension of time sought isjustified.35. Mr Carr submitted that RBS decided to wait to receive the written reasons for the decisiongiven orally on 26 July 2017, before launching its appeal. He explained that when the Tribunalgave its reasons orally, written reasons were requested, and the Tribunal informed the parties thatwritten reasons would be provided in due course, at the same time as the reasons for the Tribunal'sdecision on remedies. I do not consider this provides any sufficient explanation why the appealagainst the 27 July 2017 Order was not commenced within the period prescribed by theEmployment Appeal Tribunal Rules. When an appeal is against an order of the EmploymentTribunal, rather than a judgment, there is no requirement that the Tribunal's reasons are providedwith the Notice of Appeal. Thus, the absence of reasons neither prevents institution of such anUKEAT/0266/18/DAUKEAT/0187/18/DA-21-ABCDEFGHappeal, nor is sufficient to explain any period of delay in commencing an appeal. In the courseof his submissions Mr Carr hinted at the possible scope for embarrassment or even prejudice fora party that launches an appeal while proceedings before an Employment Tribunal remain inprogress. It was not clear to me whether that reason informed any part of RBS's decision in thiscase to await the Tribunal's written reasons before commencing its appeal. However even if thatwere all or part of the reason for the delay, it would not be a sufficient reason. Since RBS'sconcerns went to AB's capacity to conduct the litigation, one course (and to my mind the clearlypreferable course) of action was to pursue any appeal promptly, so that it could, if possible, bedetermined before the conclusion of the Employment Tribunal proceedings. Even if RBS did notwish to pursue the appeal for so long as the Employment Tribunal proceedings were in progress,it should still have commenced the appeal within time and then requested the appeal be held inabeyance pending conclusion of the Employment Tribunal proceedings. In any event, theconclusion that follows from what happened in this case is clear. RBS has failed to provide anysufficient reason for the delay in commencing its appeal against 27 July 2017 Order.36. RBS next submits that notwithstanding the lack of appropriate explanation, there areexceptional circumstances in this case which mean that the appeal against the 27 July 2017 Ordershould be determined on its merits. In Abdelghafar this Tribunal concluded that the need to giveproper effect to the provisions of the State Immunity Act 1978 (relied on the employer in thatcase) provided exceptional circumstances which warranted the appeal being heard. In this caseRBS submits the need to resolve whether AB had capacity to conduct the proceedings has asimilar effect. I do not agree that is an exceptional circumstance. For reasons I will explain later,the significance of the Tribunal's error and its approach to whether it was necessary to assessAB's ability to conduct litigation does not go either to the validity of the proceedings or theUKEAT/0266/18/DAUKEAT/0187/18/DA-22-ABCDEFGHsubstantive outcome of the proceedings. The consequence is that while Ground of Appeal 3succeeds, Ground of Appeal 1 fails because the appeal was commenced out of time.(2) Ground of Appeal 237. RBS contends that the Tribunal erred in law in its conclusion that AB had not exaggeratedthe symptoms of her psychiatric illness. The material part of the Tribunal's Judgment isparagraphs 174 -184. In its written submissions RBS contends that having concluded that ABhad capacity to

litigate, it was not open to the Tribunal to go on to conclude that AB was unablerather than unwilling to give evidence. RBS then contends that if AB was unwilling to giveevidence, the Tribunal had no option but to draw an inference that AB had exaggerated hersymptoms. RBS's written submissions also place significant emphasis on a failure on the part ofthe Employment Tribunal to make adjustments that might have permitted AB to give evidence.It appears that at the liability hearing, when AB did give evidence, a number of measures wereput in place to help her cope with the stress of being a witness. The written submissions on thefailure to make adjustments at the remedies hearing were not mentioned at the hearing before me.Nor does it appear either from the Employment Tribunal's Judgment, or so far as I can make outfrom the written submissions made by RBS to the Employment Tribunal, that before that TribunalRBS contended that with reasonable adjustment, AB could have given evidence at the remedieshearing. In light of what I have been told about how AB presented on the second day of theremedies hearing this is perhaps, not at all surprising. In any event, since those matters were notaddressed at the Employment Tribunal hearing they cannot assist RBS in this appeal. That beingso, this ground of appeal comes to a single point: was the necessary consequence of the Tribunal'sconclusion that AB had capacity to litigate that when she did not give evidence at the hearing theUKEAT/0266/18/DAUKEAT/0187/18/DA-23-ABCDEFGHTribunal had to conclude that AB was unwilling to give evidence for risk of being shown to haveexaggerated her symptoms?38. The premise of RBS's submission is the existence of a straight-line relationship betweenthe conclusion on capacity to litigate and a conclusion that AB was unwilling to give evidence.Thus, contends RBS, the answer to one question determines the answer to the other: if AB hadcapacity to conduct the litigation, she must have been unwilling rather than unable to giveevidence. I do not agree that any such simple relationship exists. In this case, the position isrendered less clear still by the conclusion I have stated above that the Tribunal was wrong not torequire assessment of AB's capacity to litigate. Yet even if this point is put to one side,determining whether or not AB was exaggerating her symptoms did not depend only on herconduct at the remedies hearing. The Employment Tribunal also had the benefit of evidence fromthe expert witnesses, in particular Dr Ornstein and Dr Stein, setting out their assessments of AB'scredibility based on their examinations of her and consideration of her medical records. Therewas also the evidence of Dr Valentine that I have referred to above, at paragraph 12. It is apparentfrom the Employment Tribunal's reasons that a number of matters led it to the conclusion thatAB had not exaggerated her symptoms. The Tribunal relied on the evidence of Dr Ornstein; theTribunal considered that some of the evidence given by Dr Stein was consistent with theconclusion that AB had not exaggerated her condition. The Tribunal took into account that ABhad given evidence at the liability hearing; and also took into account the lack of any positiveevidence (such as surveillance evidence) to support a submission of exaggeration. Finally, theTribunal accepted that AB's presentation on the afternoon of 25 July 2017 was genuine. All thesematters, taken together, provide a sufficient basis for the Employment Tribunal's conclusion thatAB had not exaggerated her symptoms. The fact that the Tribunal erred in failing to concludeUKEAT/0266/18/DAUKEAT/0187/18/DA-24-ABCDEFGHthat AB's actions at the hearing on 25 July 2017 ought to have caused it to investigate furtherwhether she had capacity to litigate, does not invalidate its conclusion that the way AB acted onthat afternoon was genuine, and demonstrated that she was not in a fit state to give evidence. TheTribunal had not, in reaching its conclusion on the capacity issue, concluded that no assessmentwas necessary because AB's actions were fake. Rather, it had concluded (in my view incorrectly)that the statutory presumption of capacity ruled out the need for further assessment. The Tribunaldid not assess the evidence inconsistently. It simply reached an incorrect conclusion as to thesignificance of the evidence when addressing the capacity to litigate point. For these reasonsGround of Appeal 2 fails.(4) Ground of Appeal 439. RBS submits that the Tribunal was wrong not to reduce compensation payable to AB onaccount of the possibility that her psychiatric condition would have developed even absent theunlawful discrimination. This submission is directed to paragraphs 283 – 292 of the Tribunal'sJudgment.40. The context for this submission is the judgment of Hale LJ in Hatton v Sutherland[2002] ICR 1613. In that case Hale LJ summarised 16 "practical propositions" relevant to claimsfor damages for psychiatric injury caused by stress arising from employment. Propositions 15and 16 were as follows"15. Where the harm suffered has more than one cause, the employer should onlypay for that proportion of the harm suffered which is attributable to his wrong doing,unless the harm is truly indivisible. It is for the defendant to raise the question ofapportionment …16. The assessment of damages will take account of any pre-existing disorder orvulnerability and of the chance that the claimant would have succumbed to a stressrelateddisorder in any event …"UKEAT/0266/18/DAUKEAT/0187/18/DA-25-ABCDEFGHAs is apparent, the purpose of each proposition is to prevent over compensation of claimants.Whether either or both is applicable in any particular case would depend on the evidence inthat case. This much is clear

from the judgment of Underhill LJ in BAE Systems(Operations) Ltd v Konczak [2018] ICR 1 at paragraph 62 where he stated as follows“62. The distinction between propositions 15 and 16 needs to be appreciated.Proposition 15 is applicable to cases where the injury in question is regarded as havingmultiple causes, one or more of which are, or are attributable to, the wrongful acts of theemployer but one or more of which are not. Proposition 16 applies where the claimant hasa pre-existing vulnerability which is not treated as a cause in itself but which might haveled to a similar injury (for which the employer would not have been responsible) even ifthe wrong had not been committed. At the level of deep theory, the distinction betweenpre-existing vulnerability and concurrent cause may be debatable, and even if it islegitimate it may be difficult to apply in particular cases. There may also be cases whereboth propositions are in play. It may in many or most cases not be necessary for a courtor tribunal to worry too much about where exactly to draw the line. Both propositions aretools which enable a tribunal to avoid over-compensation in these difficult cases.Nevertheless, they are clearly treated as conceptually distinct.”41. In this case, applying Proposition 15, the Employment Tribunal apportioned the cause ofthe harm suffered by AB, concluding it was 75% attributable to the unlawful discrimination and25% attributable to the road accident that happened in 2008. Between paragraphs 283 – 292 ofthe Judgment the Tribunal stated two conclusions relevant to Proposition 16. The first (betweenparagraphs 283 and 288) was that reliance on Proposition 16 had not formed part of RBS’s case.The second conclusion, at paragraph 292, was that the effect of Dr Stein’s evidence was asfollows“292. The Tribunal also agrees with Mr McDermott’s submissions thatDr Stein was not presenting an alternative opinion that the Claimant’s psychiatric injurywould have inevitably or possibly occurred at a later date because of her pre-existingvulnerability. Her opinion, as was the Respondent’s case, was that the injury that hadoccurred was entirely attributable to other factors than the discrimination committed bythe Respondent to the Claimant, particularly her childhood sexual trauma and her roadtraffic accident.”That conclusion had the effect of rendering redundant the Tribunals’ earlier conclusion as tothe substance of RBS’s case. RBS submits that the Tribunal’s conclusion at paragraph 292was not on the basis of Dr Stein’s evidence, one that was reasonably open to it. The materialUKEAT/0266/18/DAUKEAT/0187/18/DA-26-ABCDEFGHpart of Dr Stein’s evidence is paragraph 31 of her report dated 17 July 2017 (an addendum toher original report) where she stated this“Finally, while psychiatric work primarily in the service in assisting a patient to receivehelp, and to treat disorders, it becomes much more complex when the possibility arises ofother extraneous factors being present. In this case, it would appear that the demand tohave her psychiatric state believed, has escalated following the initial Tribunal decision.At that time the sums of money involved in any further action are potentially very great.This has to be considered as a source of secondary gain for the claimant, and perhaps alsofor her partner. This might be in addition for her desire for care, which in my opinionoriginates in what she experienced as failure of care from the police when she was 14, heron-going disappointment with her mother who she feels does not believe her, her absentfather, and her disappointments educationally. I am of the opinion on the balance ofprobability, her mental state has come tumbling out following several years of physicalinvestigations, the remnants of untreatable nerve pain, and her own growing realizationthat the life she dreamed of for herself was not going to be fulfilled. I am of the opinionthat this was a process which was inevitable, and would have occurred without thesespecific work place problems. I think that the claimant finds social interactions difficult,and that this has been a trait all her life. I am of the opinion that the claimant believesthat her physical disability is the reason for her current mental state. Without furtherpsychological work, it may be difficult for her to have insight into the impact of the earlysexual trauma, and the impact of RTA psychologically.”In my view the Employment Tribunal’s assessment of that evidence at paragraph 292 of theJudgment, was an assessment reasonably available to it. The conclusion at paragraph 292does not disclose any error of law. In these circumstances, this ground of appeal fails.(4) Ground of Appeal 542. RBS contends that the Employment Tribunal failed to give sufficient reasons to explainwhy it preferred the evidence of Dr Ornstein to that of Dr Stein. The differences of opinionbetween Dr Ornstein and Dr Stein as to the genuineness of AB’s symptoms and as to the likelycause of those symptoms were central to the disputes between the parties at the remedies hearing.The Tribunal addressed their respective evidence on these matters at various points in theJudgment, including in the section on causation and apportionment, and in the section on whetheror not AB had exaggerated her symptoms. In addition, between paragraphs 183 – 187 of theJudgment the Tribunal explained its assessment of Dr Ornstein and Dr Stein, leading to a generalUKEAT/0266/18/DAUKEAT/0187/18/DA-27-ABCDEFGHconclusion (at paragraph 187) that it found Dr Ornstein “to be, on the whole, the moreconvincing” of the witnesses. The Tribunal set out specific reasons for that conclusion.43. In its Skeleton Argument for this hearing RBS had made legion criticisms of this part ofthe Employment Tribunal’s reasoning. RBS contended that in the

course of its submissions at theEmployment Tribunal hearing it had suggested many reasons why Dr Stein's evidence should bepreferred to Dr Ornstein's evidence, but those matters were not mentioned by the EmploymentTribunal in the First Remedies Judgment. I considered that submission unsatisfactory because itall but amounted to an invitation to me to evaluate the respective merits of the expert witnesses'evidence for myself, a task that is rarely if ever appropriate in a jurisdiction founded on error oflaw. In a response to a request from me, Mr Carr re-formulated his submission to identify thekey matters showing that the Employment Tribunal failed properly to explain this part of itsdecision. If the best points were not sufficient to make good RBS's submission I failed to seehow a welter of further detail would assist its cause.44. The particular matters relied on as matters raised in submissions at the EmploymentTribunal hearing were that Dr Ornstein (1) failed to have sufficient regard to AB's medicalrecords (including those created by her GP); (2) placed undue weight on information provided byAB and failed to apply proper scrutiny to that information; (3) failed to respond fairly to some tosome of the written questions put to him when he was compiling reports for the Tribunal; and (4)was partisan in that he deliberately mis-stated or ignored evidence that tended to weaken AB'scase. RBS's submission was that because none of these matters had been addressed in theJudgment, the Employment Tribunal had failed to give adequate reasons for its decision.UKEAT/0266/18/DAUKEAT/0187/18/DA-28-ABCDEFGH45. The content of the obligation to give reasons is well-known: see Meek v City ofBirmingham District Council [1987] IRLR 250 per Bingham LJ at paragraphs 9 – 11; andEnglish v Emery Reimbold and Strick Ltd [2002] 1 WLR 2409 per Lord Phillips MR atparagraphs 16-19. The essential requirement is that the reasons are sufficient to explain why oneparty has lost and the other has won. When the issue is why the evidence of one witness has beenpreferred over that of another, it may be sufficient for the reasons to be given very shortly indeed.Much depends on context. Where the disputed evidence is given by expert witnesses it may bethe case that the reasons required may need to be slightly more elaborately stated. Yet wherethat is necessary it will be the consequence of the complexity of the issues in dispute, not simplybecause the witnesses are expert witnesses rather than witnesses of fact. In any event, one simpleand overriding point will hold good in all instances. There is no requirement that a Tribunal'sreasons must address or refer to every argument put to it. Taking the present case as an example,the written submissions of the parties ran to well over 100 pages. The impression thosesubmissions give is that no stone remained unturned. It would be disproportionate to the extentof absurdity to require the Employment Tribunal's reasons to address every line of argumentraised.46. In this case, as in all others where the adequacy of a Tribunal's reasons is called intoquestion, the submission will not be made good simply by being able to point to an argument thathas been made and then being able to show it has not been mentioned in the judgment. In allcases the starting point must be the judgment itself; and the question must be whether or not thereasons that are in the judgment meet the standard required. The answer to the question can beinformed by considering arguments not addressed, and by assessing the significance of thosearguments in the context of the issues raised in the case in hand, overall. But that is as far as theUKEAT/0266/18/DAUKEAT/0187/18/DA-29-ABCDEFGHmatter goes. The inquiry should always concern the adequacy of the reasons present in thejudgment, not whether the judgment would have been better or better reasoned if additionalmatters had been included.47. In the present case, RBS's criticisms of the Employment Tribunal's reasons are notjustified. The reasons at paragraphs 186 – 187 of the First Remedies Judgment are entirelysufficient to explain why the Tribunal preferred Dr Ornstein's evidence to Dr Stein's evidence.The points identified by Mr Carr as his "best points" are expressly referred to at paragraph 183of the Judgment. It is clear that the Tribunal had these matters well in mind, and the reasons thatfollow do address these matters sufficiently. What is more important is that the reasons given atparagraphs 186 -187 provide a coherent and clear explanation of why the Employment Tribunalpreferred Dr Ornstein's evidence. Those reasons gain support from the way in which, elsewherein the Judgment, the Tribunal addresses and resolves the disputes as to whether or not AB hadexaggerated her symptoms and as to the effective cause of her psychiatric injury. For thesereasons, Ground of Appeal 5 fails.C. Disposal48. RBS has succeeded on Ground of Appeal 3 – the challenge to the Tribunal's refusal toreconsider the decision made on 26 July 2017 that assessment of AB's capacity to litigate wasnot necessary. My conclusion, set out above, is that the Tribunal's refusal to reconsider wasirrational. I am satisfied that had there been a reconsideration the Tribunal, directing itselfproperly, would have decided that assessment of AB's capacity to conduct the proceedings wasrequired. In anticipation of these conclusions Mr Carr submitted that the proceedings should beremitted to the Employment Tribunal to determine whether, as at July 2017, AB had capacity toUKEAT/0266/18/DAUKEAT/0187/18/DA-30-ABCDEFGHconduct litigation. He submitted that the failure to undertake that assessment was a seriousprocedural irregularity amounting to an error of law, which as a matter of

fairness requiredremission back to the Employment Tribunal. He put this submission on two bases: first becausethe lack of assessment of AB's capacity invalidated the proceedings before the Tribunal; andsecond that it had been unfair not to assess AB's capacity because the process of assessmentmight have produced evidence that RBS could have relied on in support of its substantive casethat AB was exaggerating her symptoms.49. For the reasons set out below, I am not persuaded by either of these points. AlthoughRBS's appeal will be allowed on Ground of Appeal 3, there is no need for any matter to beremitted to the Employment Tribunal for further consideration. The consequence is that, subjectto the agreed amendment I have described above at paragraph 8, the Tribunal's Order followingthe remedies hearings will stand.50. The submission that the failure to assess AB's capacity to conduct litigation invalidatedthe proceedings below drew heavily on the provisions of CPR Part 21, and in particular CPR 21.3which prevents parties to litigation taking any steps in the litigation without the permission of thecourt if any of the parties to the proceedings lacks capacity to continue to conduct theproceedings. In such instances, any step taken by the parties without permission of the court "hasno effect". RBS also relied on the judgment of the Supreme Court in Dunhill v Burgin (Nos 1 and2) [2014] 1 WLR 933. In that case, a claimant compromised her claim for damages for personalinjury arising out of a road accident. The compromise was embodied in a consent order that wasput before a court, but the judge was not asked to approve the compromise, only to order byconsent that judgment be entered in favour of the claimant in the agreed amount. Six years laterUKEAT/0266/18/DAUKEAT/0187/18/DA-31-ABCDEFGHthe claimant sought a declaration that at the time of the compromise she lacked capacity. In thoseproceedings the High Court determined as a question of fact that as at the date of the compromisethe claimant had lacked capacity, and that in consequence the compromise agreement wasinvalidated by CPR 21.10 because it had not been approved by the court. The Supreme Courtupheld that conclusion, and set aside the consent order. Baroness Hale stated (at paragraph 33 ofher judgment) that the purpose underlying CPR 21 was that "… children and protected partiesrequire and deserve protection, not only from themselves but also from their legal advisers",hence the role of the court, in that case under CPR 21.10, but similarly too as I see it, under CPR21.3 As Baroness Hale explained (at paragraph 20 of her judgment), the purpose of CPR 21.10is to impose an external check on the propriety of any settlement. The power of the court to givepermission under CPR 21.3 fulfils the same function in respect of steps taken to litigate and inthe course of litigation.51. The present case is different in a number of respects from the situation before the SupremeCourt in Dunhill. First, there has been no conclusion that as at July 2017 AB lacked capacity toconduct litigation. The only relevant conclusion reached to date in this litigation is that in July2017 an assessment of her capacity ought to have been undertaken. Second, this appeal is againstan order of compensation made by a Tribunal following a contested hearing; the Tribunal did notmake its order by consent of the parties nor decide to approve the terms of an agreed settlement,rather the Tribunal has made its own merits determination of the amount of compensation due toAB. Third, AB (who now acts by a litigation friend) made it clear in the course of the appealhearing that she will not seek to re-open the Employment Tribunal's decision on grounds that shelacked (or may have lacked) capacity as at the time of the remedies hearings.UKEAT/0266/18/DAUKEAT/0187/18/DA-32-ABCDEFGH52. The first two of these matters satisfy me that it would not be right to conclude that theerror made by the Employment Tribunal was such as to render the proceedings before it void. Ido not consider that the public policy that lies behind CPR Part 21 is such as to require thatconclusion given the circumstances I have described. The Tribunal may have erred in its failureto pursue an assessment of AB's capacity to litigate, but it did not fail thereafter either toscrutinise the merits of the substantive issues before it or to reach permissible conclusions oneach of those matters. The third point above – the undertaking provided by AB in the course ofthe hearing before me – is sufficient to satisfy me that it is not now open to AB to seek to avoidthe Employment Tribunal's order consequent on the remedies hearings (on the assumption thatthe effect of the Tribunal's procedural error was to render its proceedings and the order it madevoidable). In the premises, this part of RBS's submission does not demonstrate any need as amatter of fairness, to it to remit any issue to the Employment Tribunal.53. The second part of RBS's submission is that the Tribunal's failure to assess AB's capacityto conduct the litigation goes beyond mere procedural error because the process of assessing AB'scapacity could have produced evidence that RBS might have been able to rely on to demonstratethat AB had exaggerated her psychiatric injury. Hence, contends RBS, the hearing was conductedunfairly. I do not accept this submission. Had assessment of AB's capacity to litigate taken placethe purpose of that assessment would not have been to aid one party or the other in its substantivecase, only to determine the circumstances under which the litigation could or should proceed. Tothis extent, RBS's submission misunderstands the purpose that such an assessment of capacity isintended to serve. I

accept that it would be artificial to rule out the possibility that evidencecoming to light during an assessment process might be admissible in the substantive proceedings,but that possibility – and it is no more than a mere possibility – is not sufficient to warrantUKEAT/0266/18/DAUKEAT/0187/18/DA-33-ABCDEFGHremission of this case to the Employment Tribunal. RBS has not made good its submission thatthere has been any want of fairness to it that requires the conclusion reached by the EmploymentTribunal as to the compensation payable to AB to be reopened.54. For these reasons, although RBS's appeal will be allowed (on Ground of Appeal 3 alone),there is no need to remit any matter to the Tribunal for further consideration, and the Tribunal'sorder for compensation will not be disturbed, save to the extent agreed by the parties, referred toabove at paragraph 8.

Load-Date: March 4, 2020
