



## **A PART OF INCLUSION?: DISABLED PEOPLE AND THE RIGHT TO A FAIR HEARING**

Two recent cases have highlighted the particular difficulties that disabled people face in obtaining a fair hearing before the courts. Both cases provide a common-sense framework of considerations which a court or tribunal must bear in mind. The second, **Galo**, identifies the need for better training for judges and legal practitioners in Northern Ireland as to the requirements of disabled people.

### ***Rackham v NHS Professionals Ltd (UKEAT/0110/15)***

In **Rackham**, the Claimant was unsuccessful in persuading the Employment Appeal Tribunal (**EAT**) that he had not had a fair trial in the Employment Tribunal. However, the EAT accepted the link between Article 13 of the UN Convention on the Rights of People with Disabilities (**UNCRPD**)<sup>1</sup> and the domestically drafted Equal Treatment Bench Book (**ETBB**)<sup>2</sup>. The latter is a 250-page practical guide which, among other things, leads a Judge through the process of making reasonable adjustments, including what considerations the Judge must take into account.

Mr Justice Langstaff provided guidance endorsing those parts of the ETBB<sup>3</sup> which lay down a procedure involving “*ground rules hearings*” (which are held in advance of any substantive hearings), commenting that “... *it is very often likely to be of advantage*” to the court or tribunal<sup>4</sup>. The case is under appeal to the Court of Appeal.

### ***Galo v Bombardier Aerospace UK [2016] NICA 25***

Following on from **Rackham**, the Court of Appeal in Northern Ireland heard Mr Galo’s case. Gillen LJ explained that the common law was governed by the obligation of every court and tribunal to act

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<sup>1</sup> Article 13(1) “*States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including, through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*”

<sup>2</sup> See <https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>

<sup>3</sup> Chapter 5, paragraphs 87 to 90 of the ETBB

<sup>4</sup> paragraph 60 of Rackham

fairly. In considering what was fair, the court or tribunal endeavoured to apply and, if need be, to develop the common law so as to arrive at an end result which is compliant with the UK's international obligations. In this case, the common law duty mirrored the UNCRPD Article 13 and led to the following principles:

- It is a fundamental right of a person with a disability to enjoy a fair hearing, which includes participating effectively in the hearing.
- Courts need to focus on the impact of a mental health disability in the conduct of litigation and the fact that this may influence the claimant's ability to conduct proceedings in a rational manner.
- Courts and tribunals should pay particular attention to the ETBB when questions of disability, including mental disability, arise.
- The ETBB emphasises that, in each and every case, the particular needs of the individual concerned dictate the particular needs in a case so far as they are reasonable. The individual should be given an opportunity to express his or her needs and, in some cases, expert evidence may be required.
- A modified approach may be necessary when seeking to obtain reliable evidence from people with mental health problems, especially those who are mentally frail. Chapter 7 of the ETBB expresses the need for particular assistance to be given in relation to those with mental disabilities, specific learning difficulties and issues relating to mental capacity.
- An early "*ground rules hearing*" is indicated by the ETBB: such a hearing should tailor the reasonable adjustments to the particular needs of the litigant. In appropriate cases, the tribunal or court may determine the method and approach to cross-examination, the manner, tenor, tone, language and duration of the questioning and, indeed, whether the opposing counsel should offer advance notice of cross-examination questions, with the claimant being given some time to consult with his counsel.

The Court of Appeal decided that, given this was clearly a case where the ETBB raised numerous complicated questions which had not even been addressed, Mr Galo had established that he had not had a fair hearing.

The Court noted that, even where the disabled party is represented, the court or tribunal has a duty to make its own decision as to reasonable adjustments and related matters. In this regard, **Galo** highlights the need for better training for both the judiciary and the legal profession on the needs of the disabled.

It was observed, as a matter of great concern, that no reference appeared to have been made to the ETBB by the court of first instance: *“We have formed the clear impression that the ETBB does not appear to be part of the culture of these hearings. That is a circumstance which must fundamentally change with a structural correction to ensure that this situation does not recur. Had there been proper cognisance of the contents of the ETBB, we are satisfied that a different approach would have been adopted to this case”*<sup>5</sup>.

### **Judges and disabled people**

The **Galo** judgment chimes with the *Committee on the Rights of Persons with Disabilities’* comment (to Australia) recommending that *“standard and compulsory modules on working with persons with disabilities be incorporated into training programmes for”*, among other people, lawyers and the judiciary. This, after all, is what governments promised to do under Article 13(2) of the UNCRPD. It is notable that, currently, the UK has not been held to that.

If, as **Galo** seems to say so clearly, things have to change with our developing understanding of fairness and the particular rights of disabled persons then that should apply across all judicial and quasi-judicial processes. What is preventing such change is ignorance of the Judicial Studies Board’s own rules (i.e. the ETBB) on dealing with cases which directly or indirectly affect disabled people.

**Galo** illustrates the importance of judges having an informed understanding of what is fair. They have a right, but also a duty, to consider, as part of their training and practice, documents such as the ETBB.

This requirement would also include other people adversely affected by the judicial process in other ways: because the ETBB does not only provide guidance in relation to disability but also considers gender reassignment, race, religion or belief, gender and sexual orientation. In deciding whether a trial is fair, the court must have regard to the particular guidance in the ETBB.

Lawyers need to know the contents of the ETBB so as to advise their clients and the court of factors which may ultimately have an impact on the fairness of the hearing or court process.

Gillen LJ linked the common law concept of fairness with particular rules of statutory and common law interpretation. Although these are lawyers’ terms, their impact on real people accessing real

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<sup>5</sup> Paragraph 61

justice through the courts is profound – we at Cloisters believe that, in order to secure a just outcome in a court or tribunal, they are very powerful allies indeed.