**Industrial tribunals, applicants under a disability and McKenzie friends.**

**Time to dust off the Equal Treatment Bench Book.**

The Court of Appeal in Galo v Bombardier Aerospace [2016] NICA 25 has given guidance for courts dealing with persons under a disability.

Here are the salient points of the judgement:

(1)        It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.

(2)        Courts needs to focus on the impact of a mental health disability in the conduct of litigation.  Courts must recognise the fact that this may have influenced the claimant’s ability to conduct proceedings in a rational manner.

(3)        Courts and Tribunals can, and regularly do, have regard to general, non-binding guidance and practical advice of the kind given in the Equal Treatment Bench Book published by the Judicial College (Revised 2013) (hereinafter called “the ETBB”) in considering how best to accommodate disabled litigants in the court or tribunal process. It is clear, therefore, that courts and tribunals should pay particular attention to the ETBB when the question of disability, including mental disability, arises.

(4)The ETBBprovides helpful information for judges about the problems    experienced by such litigants in accessing the courts or tribunals or participating in proceedings.  The authors point out that “this may lead to erroneous perceptions such as that the person is being awkward or untruthful and inconsistent.  In fact the problem may come down to a difficulty in communication or understanding.”  The ETBB has regularly been revised and updated.  It has a section dealing with mental disabilities describing the different ways in which mental disability may arise and manifest itself .It points out that adjustments to court or trial procedures may be required to accommodate the needs of persons with such disabilities.  Memory, communication skills and the individual’s response to perceived aggression may all be affected.  Practical advice is given to particular situations when they arise.  Decisions concerning case and hearing management “…. should address the particular needs of the individual concerned insofar as these are reasonable.  The individual should be given an opportunity to express their needs.  Expert evidence may be required.” (paragraph [20]).  It is recognised that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become greater if he/she is acting in person (paragraph [25]).

(5)        The presence of a McKenzie Friend in civil or family proceedings or an independent mental health advocate in a Tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise.  A more tolerant approach to the use of a lay representative may assist.

(6)        A modified approach may be necessary when seeking to obtain reliable evidence from a person with mental health problems especially those who are mentally frail.  It is necessary to ascertain whether any communication difficulties are the result of mental impairment.  Section 7 of the ETBB stresses the need for particular assistance to be given in relation to those with mental disabilities, specific learning difficulties and mental capacity issues .

(7)        An early “ground rules hearing” is indicated in the ETBB at Chapter 5.  Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant.  Thus, for example, the Tribunal may consider:

       The approach to questioning of the claimant and to the method of cross-examination by him/her.  Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.

       How questioning is to be controlled by the Tribunal.

       The manner, tenor, tone, language and duration of questioning appropriate to the witness’s problems.

       Whether it is necessary for the Tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.

       The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.

        Recognition must be given to the possibility that those with learning disabilities need extra time, even if represented, to ensure that matters are carefully understood by them.

        Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.

        As happened in the Rackham case, consideration should be given to the need for respondent’s counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed “reasonable adjustments”.

       The Tribunal must keep the adjustments needed under review.

[62]      Fifthly, no attempt was made, as we see it, to explore the possibility of alternative representation for this man once he lost the services of his solicitor in August 2014.  This is a matter that should have been dealt with as soon as it became apparent that he was without representation. Steps ought to have been  taken  at least to  appraise him of the possibilities of getting assistance from the *pro bono* services of the Bar and solicitors professions, the Equality Commission for Northern Ireland , the exceptions that apply to the granting of legal aid and even the use of a McKenzie Friend.

It is clear that there is a need for greater involvement of pro bono organisations in the judicial process and a requirement for some sort of user group which can liaise with courts and tribunals.