Reference number: FS 2010/0039

FINANCIAL SERVICES – application for recusal of judge – apparent bias – fair-minded and informed observer – whether sharing of office or other proximity to judge formerly chairman of RDC and involved in the case whilst employed by the FSA would lead observer to conclude that there was a real possibility of bias

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ANDREW JEFFERY **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
SANDI O'NEILL (Member)
IAN ABRAMS (Member)

Sitting in public at 45 Bedford Square, London WC1 on 5 December 2012

The Applicant, Mr Jeffery, in person

Sarah Clarke, instructed by The Financial Services Authority, for the Respondent

DECISION

1. The reference in this case is from a Decision Notice issued by the Financial Services Authority ("the Authority") to Mr Jeffery on 13 July 2010 in which Mr Jeffery was informed that the Authority had decided:

> (1) to impose a financial penalty of £150,000 on Mr Jeffery for breaches of Principles 1 and 4 of the Authority's Statements of Principle and Code of Conduct for Approved Persons in the period between 14 January 2005 and 23 October 2009, pursuant to section 66 of the Financial Services and Markets Act 2000 ("FSMA"); and
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> (2) to make a prohibition order, pursuant to s 56 FSMA, to prevent Mr Jeffery from carrying out any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

2. This case is listed for a three-week hearing to commence today, with the previous two days being allocated as reading days. Notification of the hearing was sent to the parties on 24 February 2012.

3. By letter sent by Mr Jeffery to the Tribunal by fax on 19 November 2012, Mr Jeffery raised an issue concerning the impartiality of the Tribunal. At that stage Mr Jeffery was not aware of the judge who had been listed to sit on the panel for this case. He raised the fact of the appointment in February of this year of Judge Timothy Herrington as a judge of the Upper Tribunal and gave the Tribunal notice that he would object to Judge Herrington being a member of the tribunal in this case, on the ground that Judge Herrington had been chairman of the Regulatory Decisions Committee ("RDC") that had made the decision in his case.

4. The involvement of Judge Herrington, whilst at the Authority, in this case and another involving Mr Jeffery's firm, was explained further before us. As we understand it, Judge Herrington signed the first supervisory notice to remove the authorisation of Mr Jeffery's firm on 23 October 2009. He was named, apparently as a potential signatory, on an RDC executive report dated May 2010 (another version of the same report carried the signature of Andrew Long, the Deputy Chairman of the RDC), he signed the Warning Notice and he was the Chairman of the RDC at the time the Decision Notice from which this reference is made was signed by Mr Long in December 2010.

5. Judge Herrington had not been listed to sit on the tribunal hearing this case. As a matter of policy decided by the President, Mr Justice Warren, Judge Herrington has not been involved in any financial services case before this Tribunal where the reference concerns a case with which Judge Herrington had any involvement at all during his tenure as chairman of the RDC, or where the decision was made (whether or not by him) at any time during that tenure. Accordingly, in the circumstances of this case, Judge Herrington could not have been listed to hear this reference.

6. In his letter, however, Mr Jeffery made the point that he was also concerned at the influence Judge Herrington might have on other Upper Tribunal judges. He followed this with a letter dated 21 November 2012, in which he made an application that the Upper Tribunal "recuses itself from hearing my case and seeks directions from it's (sic) Senior Court to permit a completely impartial Judge to hear my case."

7. In the letter of 21 November 2012, Mr Jeffery explained his position as follows:

> "Mr Herrington by having taken a position on BOTH sides of the 'passage' of my case and it spanning his February appointment to this Tribunal, means that there can be no doubt that he could easily speak [to] anyone of the small panel of Judges allocated to the Upper Tribunal Chancery at any time he chooses (without 'walking a dog past a house') and no doubt he already speaks to each of his Panel colleagues on a daily basis anyway.
>
> It now seems to me that since Judge Herrington's appointment in February this year, my case must fall into the same area as the 2004 Christopher Fitzgerald/Paul Davidson 'The Plumber' case and the same allegations that obviously follow, against the Tribunal's inability to remain impartial with 'an FSA insider' within it..
>
> The possibility for the FSA and Mr Herrington to be able to 'whisper in the right ear'/discuss my case with any of the Tribunal's Judge/Judges, whether appointed to my case or not, is unavoidable.
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> …
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> … I submit that it is impossible for ANY of the Judges of the Upper Tribunal (Chancery Division) to remain impartial as the possibility for my case to be discussed by Judge Herrington with any of the other member[s] of the Panel of Judges is unavoidable and that this situation would arise at every stage before, during and after my hearing.
>
> I therefore do not believe that any of the Panel of Judges of the Upper Tribunal should be allowed to hear my case."

8. On 26 November 2012 Judge Berner gave a number of directions. In relation to the recusal application he firstly expressed the view that the application was not that the case should not be heard by the Upper Tribunal (Tax and Chancery) at all; such an application, he said, would be bound to fail as this chamber has the jurisdiction to hear Mr Jeffery's reference. Secondly, the judge decided that the application should be heard by the Tribunal in open court. He accordingly directed that it be heard at the commencement of the hearing listed to commence on 5 December 2012. At the same time he disclosed that he (Judge Berner) and Judge Herrington share an office at 45 Bedford Square.

9. On the basis of that disclosure, Mr Jeffery argued before us that Judge Berner should not sit on this application and should recuse himself from the substantive hearing of Mr Jeffery's reference.

10. Before going further, we should explain Mr Jeffery's reference, in his letter of 21 November 2012 and in submissions to us, to "The Plumber" case. This refers to a

reference made to the Financial Services and Markets Tribunal (the current Tribunal's predecessor) by a Mr Paul Davidson, known for reasons that are not material as "The Plumber", of a decision of the Authority to impose a fine for alleged market abuse. The four–member tribunal hearing that case withdrew, and a new tribunal had to be empanelled to hear the case, when it was discovered that a member of the original tribunal had, during the hearing, discussed the case with the then chairman of the RDC following a chance midnight meeting of the two neighbours while out walking his dogs.

11. Mr Jeffery seeks the recusal of Judge Berner. This is based on the relationship (Mr Jeffery refers to it as an "elevated friendship") that he submits there must be between Judge Berner and Judge Herrington because they share an office. Judge Herrington would, argues Mr Jeffery, have an infinite number of opportunities to express his views and to change the beliefs or bias of Judge Berner. The personal knowledge of Judge Herrington of disputed evidentiary facts, Mr Jeffery agues, would allow him a greater opportunity to contaminate or pollute Judge Berner's decision making.

12. In addition, Mr Jeffery effectively seeks the recusal of all the Upper Tribunal judges on the ground that none can be regarded as impartial having regard to the appointment of Judge Herrington to the Upper Tribunal, and the perceived likelihood of him seeking to discuss the case with his fellow judges. Mr Jeffery says that he cannot suggest an alternative Tribunal judge who would not fail the same impartiality tests.

13. There is no allegation of actual bias. What Mr Jeffery complains of is apparent bias. It is clear that the public interest requires the avoidance of the appearance of bias; this is so as to maintain confidence in the integrity of the administration of justice. The test to be applied in such a case has been stated in many cases. In *Davidson v Scottish Ministers* [2004] SLT 895, Lord Bingham reiterated the formulation of Lord Hope in *Porter v Magill* [2002] 2 AC 357, at para 103. Lord Bingham said (at para 7):

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

14. Mr Jeffery referred us also to *Lawal v Northern Spirit Limited* [2003] UKHL 35, where the House of Lords reiterated this test, which represented what was said to be a modest adjustment to the test formerly applied by virtue of *R v Gough* [1993] AC 646, namely by excluding "real danger" of bias from the test, and applying only "real possibility". In *Lawal* (at [14]) the House of Lords also said that one is entitled to assume that the fair-minded and informed observer will adopt a balanced approach. As Kirby J expressed it in *Johnson v Johnson* (2000) 200 CLR 488 (at para 53), "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".

15. Whilst earlier authorities provide a useful guide, every application of this nature must be decided on the facts and circumstances of each case. A wide range of

authorities, and the relevant law, were examined by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451. In summarising the position the Court (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) said (at [25]):

> "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

16. In *Locabail*, the Court found force in the observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union*, 1999 (4) SA 147, 177:

> "It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

17. This illustrates the context in which the danger or possibility of bias must be approached by the fair-minded and informed observer. It includes the oath of independence taken by judges (including tribunal judges), and the training and experience which underpins that independence.

18. With that background we turn to consider Mr Jeffery's application. He argues that the fact of Judge Herrington's role as Chairman of the RDC and his involvement in and knowledge of this case, and that he has now become a judge of the Upper Tribunal, gives rise to a real possibility of bias, both in respect of Judge Berner, for the reasons of close physical proximity referred to earlier, and in respect of the other judges of the Upper Tribunal (Tax and Chancery).

19. In his submissions to us Mr Jeffery made the point that the question of perception of bias ought to have been addressed by the Tribunal at the time Judge Berner was allocated to sit on this panel. The issue was instead brought to the Tribunal's attention by Mr Jeffery himself, following an internet search to establish the names of the relevant Upper Tribunal judges. Furthermore, it was only following his raising of this issue that on 26 November 2012 Judge Berner disclosed that he shared an office with Judge Herrington. Mr Jeffery also complains that the Authority made no specific disclosure to him of the involvement of Judge Herrington in this case whilst he was an employee of the Authority.

20. Mr Jeffery referred us to a number of press articles and other material taken from the internet. These included comments, and criticisms, by certain commentators of the move of Margaret Cole from her post as board member of the authority, responsible for enforcement, to the services firm of PricewaterhouseCoopers,

variously described as "typical City incest" and as "a typical 'gamekeeper turned poacher' move".

21. The appointment of Judge Herrington to the Upper Tribunal was referred to in a Reuters article dated 23 April 2012, which discussed the case of *John Pottage v The Financial Services Authority* (FS/2010/33), where the Tribunal decided that the Authority had not established its case on misconduct. The article refers to the fact (which we have not checked) that before the *Pottage* case the Authority had only lost twice before the Tribunal. It goes on to refer to Judge Herrington's appointment and quotes Harvey Knight, head of UK financial services at the law firm Withers, as saying, "It remains to be seen whether his [Judge Herrington's] influence will encourage the Tribunal to rule more consistently in line with the RDC."

22. Mr Jeffery told us that, according to Withers' website, Mr Knight spent six years employed by the Authority in its enforcement division and is "An expert on the FSA's Enforcement procedures". He submits that Mr Knight, a solicitor of 20 years' practice (of which six years were spent at the Authority), can be considered to be a fair-minded and informed observer and that, as reported by Reuters, Mr Knight is clearly referring to the real possibility that the Tribunal could be biased in the future by the direct influence of Judge Herrington.

23. On this basis, Mr Jeffery submitted that anyone, reading the events of the Plumber case, the events in his own case and the history of Judge Herrington's involvement with this case, his employment with the Authority and his appointment to the Tribunal, and the fact that Judge Herrington and Judge Berner share an office, would conclude that Judge Berner is unable to sit because of the real possibility of bias or ability to be swayed. By extension, the physical proximity of the other upper Tribunal judges (in the same building, if not sharing the same office) would also disqualify them for the same reasons.

24. We considered Mr Jeffery's submissions very carefully, but as we explained in our short oral decision announced to the parties, we do not accept his arguments. We do not accept that these circumstances would be regarded by the fair-minded and informed observer as giving rise to any real possibility of bias. Mr Jeffery's submissions are based on two premises neither of which we consider would be adopted by such an observer.

25. The first is that Judge Herrington would be mindless of his own and others' judicial independence and could reasonably be assumed, on the basis of his prior role within the Authority, and his knowledge of cases dealt with by the Authority during his tenure, to seek to influence other judges in favour of the Authority. We do not consider that the fair-minded observer, in the absence of clear evidence of such conduct (of which there is none), would come to that conclusion. To do so would be to ignore the judicial oath of independence and impartiality which Judge Herrington, along with all other judges, took on his appointment. Echoing what Lord Rodger said in *R v Secretary of State for the Home Department* [2005] UKHL 13 (at [10]), it would in our view be absurd to suggest that Judge Herrington's previous role as chairman of the RDC of itself precluded him from reaching an independent and

impartial judgment, when occasion demanded. That exercise of judgment in our view would also extend to not seeking in any way to influence the judgment of others in any case, whether it was one in which Judge Herrington had a previous involvement whilst at the Authority or not.

26. It is clear from *Davidson* that, in determining whether there is a disqualifying appearance of bias arising from identification with a cause or a body, the mere fact that a judge has been a member of a government, in that example, would not be sufficient. It was held that there had to be a nexus between the issue before the court and the role of the judge while he was a minister. There was a similar outcome in the European Court of Human Rights in *Piersack v Belgium* [1983] 5 EHRR 169, where it was said that the mere fact that the judge had been a public prosecutor was not a reason for fearing that he lacked impartiality, unless he dealt as prosecutor with a case now before him as a judge. Whilst it is clearly correct that a judge should not sit on a case in which he has had an involvement in another capacity, there is no suggestion that the appointment of a judge from government, the public prosecution service or (as in this case) a regulatory authority would give rise to apparent bias on the part of judges hearing those cases from which the judge was, by virtue of some connection between the case and his previous role, precluded from taking part.

27. We reject in particular Mr Jeffery's submission that, from February 2012, the Authority has installed an "FSA insider" into the Upper Tribunal offices at 45 Bedford Square who can speak to any of the Upper Tribunal judges in the Tax and Chancery Chamber whenever he wishes. There is absolutely no basis or foundation for this allegation. A fair-minded and informed observer would reject any such notion.

28. The second premise on which Mr Jeffery's application is made is that Judge Berner, or any other Upper Tribunal judge appointed to the case, would also be careless of the judicial oath and the overriding requirement to be independent and to reach a decision, with other specialist members of the tribunal, objectively and based on reasoned argument untainted by professional contact with any others, including his fellow judges. We do not consider that the fair-minded and informed observer would take such a view, irrespective of the closeness of the physical proximity of the judges during the working day. The observer, in our view, would be expected to have an understanding of the judicial oath and the duty of impartiality that is at the core of the judicial process. He would appreciate the ability of judges to adjudicate impartially on cases, even where they are invited – as they frequently will be – to disagree with a fellow judge's decision.

29. We do not consider that the remarks attributed by Reuters to Mr Knight of Withers can be regarded as a proxy or benchmark for the fair-minded and informed observer. We regard Mr Knight's comments as mere speculation. Speculation of such a nature might properly be regarded as a starting point for any enquiry by a fair-minded observer, but would not in our view survive the scrutiny of such an observer once he had fully informed himself. Speculation is not the same as reaching an informed decision that something is a real possibility.

30. Mr Jeffery submitted that the difficulty for him, and what he believed would be the difficulty for the public, is that there could be no certainty that a judge, and in these particular circumstances Judge Berner, would not be influenced, either now or in the future, given the ability of Judge Herrington to speak to his fellow judges. In our view what Mr Jeffery is describing is a hypothetical risk, or a suspicion of risk, leading to his uncertainty, and not, regarded from the perspective of a fair-minded and informed observer, and for the reasons we have explained, a real possibility.

31. This is not a case, such as that of The Plumber, where an actual discussion of the case took place between the judge and one of the parties. In our view, a fair-minded observer would draw a clear distinction between such a case and the present, where the only circumstance said to give rise to an appearance of bias is the proximity within the same building or office of the judge hearing the case and a judge who, prior to his appointment, held the office of chairman of the decision-making committee within the Authority, and who was involved in the case in that capacity.

32. Ms Clarke argued that, if this application were to succeed, the result would be that this Tribunal would be prevented from hearing any case that had commenced within the Authority whilst Judge Herrington had been employed there. She submitted that this cannot be right. We do not consider that would be a proper reason to refuse the application. If we were of the view that the fair-minded and informed observer would have concluded that the circumstances gave rise to a real possibility of bias, we would have granted the application, and Judge Berner would have recused himself, irrespective of the possible consequences.

33. We base our conclusion that this is not a case of apparent bias, such as to require Judge Berner, or any other of the Upper Tribunal judges, to recuse himself, on the particular facts of this case. We should, however, refer to a very-recently decided case in the Employment Appeal Tribunal, *Bhardwaj v FDA and Others* UKEAT UKEAT/0157-8/11/ZT, in which the appointment of certain tribunal members was in issue.

34. The facts in *Bhardwaj* were themselves unusual. Two individuals, a Mr Whiteman and a Ms Crighton, who were respondents to a claim of race discrimination made by Ms Bhardwaj, applied to become lay members of the Employment Tribunals. Each was appointed, Mr Whiteman being assigned to the London South region and Ms Crighton to the London Central region, the region in which the proceedings in Ms Bhardwaj were at that stage lodged.

35. When the Tribunal became aware of the position, it was agreed with the President that Mr Whiteman and Ms Crighton could continue with their training, but that they would not sit whist the claim was continuing in London Central. During an adjournment of the hearing, Mr Whiteman attended a training day run by the London South region. By chance, because he had not been able to attend the equivalent event organised by the London Central region, Mr Carter, one of the lay members in the case, also attended the London South training day. He had a brief exchange of pleasantries with Mr Whiteman before it was realised that the two should not be talking to one another. Steps were taken to ensure that they were kept apart.

36. The EAT found, in respect of Mr Whiteman, that there was no apparent bias. What happened by way of fortuitous brief contact between Mr Whiteman and Mr Carter at the London South training event was not such as to cause a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

37. In respect of Ms Crighton, the EAT decided against the claimant on the basis that there had been a waiver of any apparent bias. However, the EAT expressed the view that, absent such a waiver, had the claimant asked the tribunal to recuse itself on the basis of the circumstances of Ms Crighton's appointment, it would have been right for it to have done so. This was on the footing that a lay member within one of the regions might reasonably expect to sit with any of the other lay members appointed to that region and that in those circumstances the lay members sitting on an employment tribunal could reasonably be expected to have a different attitude towards a person, with whom they might expect to sit as a colleague in future, when considering their credibility or the quality of their conduct.

38. The conclusion reached in *Bhardwaj* on the question of apparent bias in the circumstances of Ms Crighton does not deflect us from our own conclusion in the circumstances of this case. In *Bhardwaj* the EAT focussed on the attitude of the lay members of the tribunal to a fellow lay member, and the circumstances, which are not present in this case, were that the lay member in question was a respondent in the proceedings and had given evidence to the tribunal as such.

39. In this case, as we have described, the fair-minded and informed observer would have regard to the independence both of Judge Herrington, in himself being impartial notwithstanding his previous role, and the other Upper Tribunal judges in retaining impartiality whilst at the same time being judicial colleagues of Judge Herrington. The fair-minded observer would conclude, as we have done, putting ourselves in the shoes of such an observer, that there was no real possibility that this Tribunal is biased.

40. Accordingly, and for the reasons we have given, we dismiss Mr Jeffery's application. Our decision is unanimous.

ROGER BERNER

TRIBUNAL JUDGE
Release date
7 December 2012