Appeal No. UKEAT/0227/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 December 2014
Judgment handed down on 27 February 2015

Before

HER HONOUR JUDGE EADY QC

BARONESS DRAKE OF SHENE

MRS M V McARTHUR BA FCIPD

MS S A TAYLOR — APPELLANT

THE GOVERNING BODY OF THE POTTERS GATE CE PRIMARY SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR IVAN HARE (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR TOM KIRK (of Counsel) Instructed by: Surrey County Council Legal Services County Hall Penrhyn Road Kingston-upon-Thames Surrey KT1 2DN

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Did the fact that the Employment Judge was a governor of a Surrey school at the time of the Employment Tribunal Hearing (and became Chairman of the governing body before the decision was promulgated), give rise to the appearance of bias when he sat on a case involving another Surrey school (the governing body of which was a party).

Applying **Porter v Magill** it was necessary to (1) ascertain all the circumstances having a bearing on the suggestion that the Judge was biased; and (2) ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased.

This was not a case involving any common policy or line (in contrast to **Hamilton v GMB**); the Employment Judge had no prior dealings with any of those involved in the case and was unaware of any connection between the Head Teachers of the two schools. Although both schools had access to the same training and advisory services (provided by Babcock 4S), that did not change the position. Ultimately, having ascertained and scrutinised all the circumstances material to the suggestion that the Employment Judge was biased, the fair-minded and informed observer would not conclude that there was any possibility of bias in this case.

HER HONOUR JUDGE EADY QC

1. We refer to the parties as the Claimant and the Respondent as they were below. The appeal is that of the Claimant against a Judgment of the Reading Employment Tribunal; Employment Judge Gumbiti-Zimuto sitting with lay members over some seven days during September, November and December 2012 ("the ET"). The Judgment was sent to the parties on 19 February 2013, along with written reasons running to some 32 pages. The Claimant appeared in person before the ET but at Preliminary and Full Hearings before this Court has had the benefit of pro bono representation by Mr Hare, of Counsel. The Respondent was represented before the ET and at the Full Hearing of the appeal, by Mr Kirk of Counsel.

2. The Claimant claimed constructive unfair dismissal; disability discrimination; less favourable treatment as a part-time worker; and of breaches of contract. The ET dismissed all save a breach of contract complaint, for unpaid wages from September to December 2009.

3. The appeal is based on the Claimant's contention that the ET's Judgment cannot stand as it is tainted by the appearance of bias. This is said to arise from the Employment Judge's other role as a school governor.

The Background Facts and the ET's Decision

4. The Respondent is the governing body of a school situated in Farnham, Surrey ("Potters Gate" or "the school"). The Claimant was employed by the Respondent from 1 September 2004 as a teacher, initially working full time. In June 2008, the Claimant suffered injuries in a riding accident, which led to her being absent from work until July 2009. Her resultant disability placed her within the protection of the **Equality Act 2010**.

5. There were various issues before the ET relating to both the period of the Claimant's absence and her return to work, on a part-time contract. In particular, issues arose between the Claimant and the Head Teacher of the school, and their relationship broke down over time. The Claimant pursued a grievance, which was heard and dismissed by the governors. Ultimately the school was unable to continue to offer the Claimant the same hours of work and notified her of a reduction. At that stage the Claimant resigned, claiming constructive dismissal on account of the acute stress she said had been caused to her by events since her accident in 2008.

6. On the various matters relied on by the Claimant as establishing a significant breach of contract such as to entitle her to claim constructive unfair dismissal, the ET concluded, contrary to her case, that the redundancy had not been predetermined; the matters relied on by the Claimant were in fact the Respondent's attempts to consult with her, and the way in which she had been offered an alternative role did not count as evidence of predetermination. Neither was the revised contract unworkable. The school's needs had changed and the Claimant was wrong to think her role as a 0.4 full-time equivalent still existed in the same way or that there was a redundancy situation only because she had asserted her rights; others had also been considered and a fair consultation had been carried out, including with the Claimant's trade union.

7. As for the other matters of which the Claimant complained, the ET generally preferred the Respondent's case to that of the Claimant; in particular, it accepted the evidence given by the Respondent's Head Teacher. It concluded that the Claimant had not made out a fundamental breach of contract and, therefore, dismissed the claims dependent on her establishing constructive dismissal. The ET considered the complaints of disability discrimination and victimisation in the handling of her grievance but again concluded those

complaints were not made out. It further rejected her claim of less favourable treatment as a part-time worker.

The Facts Relevant for the Apparent Bias Appeal

8. Evidence has been submitted to us by both parties. At an earlier stage, the comments of the Employment Judge (responding to those parts of the Amended Notice of Appeal setting out the facts relied on by the Claimant as giving rise to the appearance of bias) were also received. Ultimately there is no real dispute as to the relevant facts (which we summarise below); any difference between the parties is as to the inference that should be drawn from them.

9. As stated, this case concerns the Potters Gate School. The Respondent to the claim was the Potters Gate Governing Body.

10. Subsequent to receiving the ET's Judgment, the Claimant learned (through her own researches) that the Employment Judge was a community governor in another primary school in Surrey (the Shalford School, or "Shalford"). Between the ET hearing and the writing of the Judgment, the Employment Judge became chair of that governing body.

11. The two schools are physically located some 10-15 miles apart. Shalford is an infant, community school. Potters Gate is a voluntary controlled, primary school.

12. Both schools are part of a group of some 50-60 schools (known as a Quadrant) which shared termly briefing meetings for their head teachers. There is no evidence that the Employment Judge was actively aware of this fact at the relevant time. When asked to comment on the connection between the schools, his response to the EAT was that "As far as I

am aware there are no links at all, and certainly no close links, between the Governing Body of Shalford Infant School and the Governing Body of Potters Gate School" and he had "no idea whether Mrs Herlihy [Head Teacher Shalford] knew Mrs Whittington [Head Teacher Potters Gate]".

13. In any event, the schools were not part of the same confederation (that is, a small group of schools that have chosen to form a local confederation, sharing (for example) training for staff and governors): Potters Gate is in the Weyside Confederation; a geographically organised grouping not including Shalford, which is part of the Cobwebs group of small infant schools.

14. On the other hand, both schools are, to some degree, under the control of Surrey County Council and would (as Potters' Gate did in this case) draw upon the defence services provided by the Council if needed. The Employment Judge had not had any contact with Surrey County Council's Legal Services team in his capacity as a school governor and there is no evidence that Shalford had used these services at any time relevant for our purposes.

15. Both schools also obtain certain support services from a third party known as Babcock 4S. We are told that Babcock Education is the largest integrated educational support service provider in the UK. As such, it works with over 50 local authorities and employs over 600 education specialists. Babcock 4S is a joint venture partnership between Babcock Education and Surrey County Council. It employs some 35 administrative and managerial staff and uses approximately 200 odd operational staff, associates, or consultants providing consultancy services for schools. Certain of Babcock 4S's services will be made available to Surrey schools, with an option for them to buy more of those services should they so wish. Babcock 4S thus provides policies and procedures which Surrey schools may use or adapt for individual use

(although they are not obliged to do so). Schools can also obtain human resource advice and support from Babcock 4S and it arranges the termly Head Teacher briefing meetings on a Quadrant basis, as well as providing training for governors of Surrey schools.

16. The Respondent's witnesses before the ET included a Ms Julie Quick, a personnel consultant for Babcock 4S. The ET also heard from the Head Teacher (Ms Whittington), the Chair of the governing body (Mr Linscott) and another parent governor (Mr Mills). There was no issue as to the correctness or otherwise of any Babcock 4S policy or process. The ET records the relevant parts of Ms Quick's evidence as relating to her advice concerning occupational health guidance and the calculation of the Claimant's part-time teaching hours and pay.

17. The Employment Judge's dealings with Babcock 4S are addressed in his comments for the purposes of this appeal, as follows:

> **"… Babcock 4S provides services to Surrey Schools. The level and extent of the services provided is dependent on the service level agreement entered into between the school and Babcock 4S. The services provided by Babcock to schools were in years gone by provided by the local education authority, now they are provided by private companies to schools. There is no other link or connection between Babcock 4S, the Governing Body of Shalford School or the Governing Body of Potters Gate School.**
>
> **…**
>
> **I am currently in the role of chairman of the Governing Body at Shalford Infant School. I occasionally have contact with advisors from Babcock 4S. Recently I had a meeting with a member of Babcock 4S staff in respect of the recruitment of a school business manager and I also have annual meetings with a member of Babcock 4S staff while carrying out Performance Management of the Head teacher of my school. In the ordinary conduct of my duties as a governor I have little contact with Babcock 4S. The school determines its own policies, it in some cases adopts and adapts 'Model' policies provided by Babcock 4S.**
>
> **…**
>
> **… I have no other connection with Babcock 4S. I am not aware of who advises Potters Gate School. I am unable to comment on the number of advisers that support both schools. I am unaware of the other schools that Babcock 4S advisors work with. …"**

18. There is no evidence that the Employment Judge, in his role as a school governor, had had any dealings with Ms Quick.

19. Equally, although he attended governors' training events (which are likely to have been organised by Babcock 4S), there is no evidence that the Employment Judge did so at the same time as any of the Potters Gate governors involved in this case. Indeed, outside of this case, he was unaware of ever having met anyone who was a governor of Potters Gate.

The Appeal

20. The Notice of Appeal in this matter was initially lodged out of time but, on 3 February 2014, HHJ Shanks allowed the Claimant's appeal against the Registrar's order and extended time. He also gave leave for the Claimant to put in Amended Grounds to include what can be described as "the appearance of bias" point. That related to the Claimant's discovery, after the hearing of her case, that the Employment Judge was a governor of a Surrey school. As such she questioned whether there was not a real possibility that the Judge was biased in this case or, at least, that the fair-minded and informed observer would so conclude.

21. Subsequently, directions were given for the Employment Judge to respond to those parts of the Amended Notice of Appeal that went to the Claimant's contention that there was an appearance of bias. The Employment Judge duly provided his comments and these were taken into account when this matter came before me at an Appellant-only Preliminary Hearing on 24 September 2014. I was persuaded that the appearance of bias point should proceed to a Full Hearing but rejected the other proposed grounds.

Relevant Legal Principles

22. It was common ground before us that the test for apparent bias is that approved by the House of Lords in **Porter v Magill** [2002] 2 AC 357, that is, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility

that the Tribunal was biased. In considering the application of this test to the present case, the principles that we summarise below are similarly not in dispute in the submissions before us.

23. If the fair-minded and informed observer would conclude that there was a real possibility that the Tribunal was biased, there is no discretion: the Tribunal concerned would have to recuse itself. In this respect, the public perception of the possibility of unconscious bias is key (per Lord Steyn in **Lawal v Northern Spirit Ltd** [2003] ICR 836 at paragraph 14); justice being seen to be done is a matter of public confidence (**Hamilton v GMB (Northern Region)** [2007] IRLR 391, EAT) and this principle underpins the approach that is thus to be adopted.

24. In determining whether or not the fair-minded and informed observer would conclude that there was a real possibility that a Judge was biased, the Court must first ascertain all the circumstances that might have a bearing on that question. In so doing, the fact that the Judge concerned sat with others would not detract from the possibility that there was an appearance of bias (**Lodwick v LB Southwark** [2004] IRLR 544). Further, although no weight would be attached to a mere assertion by a judicial office-holder that they were not biased, the material circumstances could include the Judge's explanation as to their knowledge or appreciation of those circumstances (**In re Medicaments and Related Classes of Goods (No.2)** [2001] 1 WLR 700, CA). What are the material circumstances will be those apparent to the Court upon investigation; they are not limited to those apparent to the hypothetical observer at the original hearing (**Hamilton** paragraph 29(3)). That said, if the Judge simply did not know of the matter relied on, the danger of it having influenced the judgment will be eliminated and the appearance of bias dispelled (**Locabail (UK) Ltd v Bayfield Properties Ltd and anor** [2000] QB 451, CA, at paragraph 18). It is the Judge's actual knowledge that is relevant; there can be no real

suspicion of bias where the Judge does not know of the relevant matters giving rise to the potential conflict of interest (**Hamilton** paragraph 29(4)).

25. Although no exhaustive list could be given as to the circumstances that might lead the fair-minded and informed observer to conclude that there was a real possibility of bias, the Court of Appeal in **Locabail** sought to provide some guidance as to the kind of matters that might, or might not, be relevant, thus:

> **"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 … 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 … 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."**

26. The fact-sensitive nature of the assessment was evidenced in the case of **Hamilton v GMB**. An application had been made in that case for one of the lay members of the Employment Tribunal (Mrs Dunn, a lay representative drawn from the union side) to recuse herself from hearing a case involving disciplinary action for flouting an established policy of the GMB; a policy which was shared (at least in substance) with Unison, the trade union to

which Mrs Dunn belonged and had held senior office within. The EAT concluded that, without there being any evidence of actual collusion between the two unions, on these facts a reasonable person would take the view that Mrs Dunn might be unconsciously biased when considering the legality of the policy in issue. Given Mrs Dunn's position within Unison and the issues raised by the case, her potential (even if not conscious) wish to support the policy went beyond that which might naturally be felt by most union officials.

Submissions

The Claimant's Case

27. Mr Hare submitted that the point before the EAT was a narrow one: whether the fact that the Employment Judge was a governor of a Surrey school at the time of the Hearing, and became Chairman of the governing body before the decision was promulgated, gave rise to the appearance of bias. The legal position was clear; the test was that laid down by the House of Lords in **Porter v Magill**. If there was a real possibility of bias, the Judge had to recuse themselves from hearing the case; there was no discretion to do otherwise. Although a Judge should not yield to a tenuous application - and must comply with their judicial obligation to hear the cases that came before them - where there was any real possibility of doubt, the balance tipped in favour of recusal (**Ansar v Lloyds TSB Bank plc** [2006] EWCA Civ 1462).

28. To the extent that the Respondent relied on the case of **Khan v Kirklees Metropolitan Council and ors** UKEAT/0383/06/DA, that case involved extreme facts (Mr Khan had conducted a lengthy campaign to try to force the ET Chairman to recuse himself; culminating in naming him in ET proceedings against a school of which he was chairman of governors) and it was relevant to note that, at the outset of the ET hearing, the Chairman had disclosed his governorship and addressed the question of any link with the Respondent school. Although the

schools in that case were not in the same local authority and there was no suggestion of their sharing training and other services, the matter had still been raised and the parties had the opportunity to address the ET on the point.

29. As for the possible categories of cases cited in **Locabail** (relied on by the Respondent), it was important to note the general caveat set out in first two lines of paragraph 25. To the extent that the Respondent was suggesting that the Employment Judge's role as governor was analogous to "service or employment background", it should be noted that the Court of Appeal was saying that this would not "ordinarily" be a ground for objection; allowing that there might be cases where it would be. Further, in that case the Court of Appeal was concerned with the issue of past service or employment history, which was not the same as the Employment Judge's currently carrying out the role of governor. As for the reference to membership of sporting or charitable bodies, membership was not the same as being part of the governing mind of such a body. More generally, it should be noted that the Court of Appeal in **Locabail**, had seen it as relevant where there was an issue as to the credibility of a person known to the Tribunal and saw the passage of time as a relevant consideration.

30. As for the relevance of the Judge's own knowledge of the relevant circumstances, that would be fact-specific. If the Judge knew of the relationship in issue, lack of knowledge of the other details would not provide a complete answer to the point (see, by analogy, **Hamilton**).

31. Turning to the facts of this case, the Employment Judge was a governor of Shalford and became chairman of governors, a role which was described (in guidance issued by Babcock 4S) as "Being a critical friend" to the Head Teacher. Indeed, the chairman's relationship with the Head Teacher was seen (in that guidance) as one of partnership and "one of the most important

working relationships in the school". On the Shalford website, the Employment Judge talked of using his professional skills in his work as a governor. The concern was that his experience as a governor might (subconsciously) have informed his work as an Employment Judge.

32. As for the schools in question, they were around 12 miles apart and shared Guilford postcodes. They were both under the ultimate control, to some degree or other, of Surrey County Council; would draw on the same defence services if needed and were both in the same quadrant. Further, Babcock 4S - a joint venture between (the much larger) Babcock Education and Surrey County Council - provided services to both schools, deploying a limited number of consultants (five were listed in the evidence) and only one governance consultancy manager for all the schools in Surrey. There were generic Babcock 4S policies for use in the schools in the area; these would include model policies on staff attendance and on grievance and disciplinary matters (albeit they could be adapted for local use).

33. The Employment Judge was aware that Babcock 4S provided policies that Surrey schools could use and accepted that he had had some contact with that organisation (attending some training events; having contact with an adviser on recruitment issues and in annual meetings as part of the performance management of the Shalford Head Teacher). Although he had not met members of the Respondent governing body when undertaking his training, there was a substantial overlap in the courses provided and there would thus be a certain commonality of experience. The Head Teachers of the two schools attended termly training meetings organised by Babcock 4S and met each other on these occasions and (the Employment Judge had volunteered) the Shalford Head Teacher had provided guidance to other schools in the area.

34. The role of the Head Teacher in the current case had been fundamental to the issues the ET had to determine. To a large extent issues of credit came down to the ET preferring the evidence of the witnesses called by the Respondent - the Head Teacher, two members of the governing body, and a consultant from Babcock 4S - to that of the Claimant (albeit that some of that evidence was corroborated by documentation). The reasons provided by the ET demonstrated particular sympathy with the governors and the demands on their time.

35. Given all these circumstances, the reasonable and informed observer would conclude there was a real possibility of bias. The Claimant was not saying that this would always be the case where proceedings involved a school and the Employment Judge was a school governor; each case must depend on its own facts. On these particular facts, the risk was apparent. Allowing that there might be a public policy consideration in favour of those holding judicial office taking on voluntary commitments for the benefit of their local communities, that must be secondary to the public interest in the proper discharge of judicial functions, fundamental to which must be the public perception in judicial impartiality. Here confidence in that impartiality was lost. That was all the more so given that the Employment Judge had failed to raise the fact of his role as governor with the parties at the outset (which would have given them the opportunity to say whether or not they objected: the parties might simply have chosen to waive any issue but had not been given the opportunity to do so).

36. This case went further than merely the Employment Judge carrying out a community role which had not been disclosed. He was involved in the governing body of a school and it was another set of school governors who constituted the Respondent in the case. Moreover this was another school in Surrey, which shared certain services - in particular (through Babcock 4S) human resources training and advice - with the school of which the Employment Judge was a

governor. Further, this case was one which required the ET to form a view of the credibility of the Head Teacher (with whom school governors of the school would have close links) and the relevant advisor from the entity (Babcock 4S) to which both schools would look for advice.

The Respondent's case

37. Mr Kirk agreed that the approach was that laid down in **Porter v Magill**, that is: (1) the Court must ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased; and (2) must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Judge was biased.

38. In carrying out its task, the Court might properly inquire whether the Judge knew of the matters now alleged to have undermined his impartiality; ignorance of the same would preclude any danger of bias (see per the Court of Appeal in **Locabail** paragraphs 18 and 55 and the EAT in **Hamilton v GMB** at paragraph 29(4)). In this regard, any explanation given by the Judge may form part of the material circumstances (**Re Medicaments (No. 2)** paragraph 86), albeit that will only be part of the evidence and the Court is not bound to accept it (although here the Employment Judge's statement was clear and no grounds had been put forward for not doing so).

39. Although the Employment Judge in this case knew he was a governor of a school and was here concerned with a case involving the governing body of another school, he did not know of many of the linkages the Claimant now relies on. He was unaware, for instance, of any links between the Head Teachers of the schools; had only limited connection himself with Babcock 4S and no connection with Surrey County Council (save as a resident). That the Head Teachers of the two schools might share termly briefing meetings would not be of relevance if

the Employment Judge did not know of this fact. Similarly, the hypothetical possibility that Shalford would have called upon the defence services of the legal department within Surrey County Council if faced with an ET claim could not give rise to any real possibility of bias.

40. Allowing that it would have been better if the Employment Judge had disclosed his governor role at the outset of the hearing (**Locabail** paragraph 21), that did not vitiate the decision.

41. Although every case must turn on its own facts, in **Locabail**, the Court of Appeal had opined (paragraph 25) that, ordinarily, an objection could not be soundly based on "the judge's social or educational or service or employment background or history", "membership of … charitable bodies" or "extra-curricular utterances". On the other hand, the Court of Appeal had allowed that "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...". The Employment Judge's role as a school governor was akin to an extra-curricular public duty; not dissimilar to "service background". Whilst issues of credibility had arisen in this case, this was not against a background of any personal knowledge or connection with those involved (unlike the examples given by the Court of Appeal in **Locabail** of cases which might give rise to real possibility of bias).

42. There was certainly no general rule that Employment Judges who were also school governors should not sit on cases involving other schools. Although **Khan v Kirkless MBC** involved rather more extreme facts, it was also a claim brought by a teacher against a school

(and also against the Head Teacher as an individually named Respondent), where the Employment Judge had (as here) confirmed that he had no direct connection with the Respondent school. Amongst other things, the Claimant in that case had raised the question of apparent bias arising out of the possibility that the Employment Judge would side with the governing body of the Respondent school but the EAT had apparently not considered that to be a fact that compromised the Judge's impartiality.

43. Applying the principles laid down in the case-law to the circumstances of this case, the Respondent submitted: (1) accepting the Employment Judge's evidence, he had no knowledge of many of the linkages relied on by the Claimant and that should dispel any possibility of bias; (2) in any event, none of linkages relied on showed any direct connection between the Employment Judge and those involved in these proceedings; and (3) the fair-minded and informed observer would be informed not just as to the linkages but also as to the nature of the issues the ET had to determine and would ask whether any of those linkages actually touched upon an issue the ET had to decide so as to impact upon its ability to do so impartially.

44. Turning to the particular facts, the first matter relied on was the status of the Employment Judge as a school governor. The Claimant relied on the guidance given to governors but that was not only to be a critical friend but also encouraged governors to challenge the Head Teacher when appropriate and made clear that they "must be capable of independent thought; decisions must not be made just to please other people, even the head teacher". In any event, it could not be the case that simply because a judicial office-holder as a school governor had a close working relationship with the Head Teacher there must automatically be a real possibility of bias when determining cases involving other schools.

45. Certainly the ET in this case did not rely on the Head Teacher's previous experience as the basis for preferring her evidence to that of the Claimant. In each example relied on by the Claimant, the ET's reasoning included reference to objective parts of the evidence, not simply that of the Respondent's witnesses.

46. Apart from general points relating to the Employment Judge's status as a governor, there was really nothing more. Other than geographical location (both based in Surrey), there was little connection between the two schools. They might be part of the same large quadrant (some 50-60 schools) but were in different areas for local authority purposes (one Waverley; one Guildford). There were termly meetings for the Head Teachers, but the Employment Judge did not attend these (or even know of them). There was no evidence he had met any of the Respondent's governors. Although Babcock 4S could provide advice and policies relevant to certain of the schools' statutory obligations, there was no requirement for individual schools to take this up; they were free to go elsewhere. In any event, unlike **Hamilton**, this was not a case in which an issue arose relating to a shared strategy (there, strategy shared by both the GMB and Unison); why should any perception of possible bias arise?

Discussion and Conclusions

47. We agree with Mr Kirk, the starting point must be for us - standing in the shoes of the fair-minded and informed observer - to ascertain all the material circumstances. Although there had initially seemed some dispute between the parties on the facts, ultimately these have largely been agreed and are as we have set out above.

48. It was common ground between the parties that simply the fact that the Employment Judge was a school governor and this was a case involving a school (the governing body of

which was the Respondent) would not be sufficient to give rise to an appearance of bias. We agree. Those carrying out judicial roles will inevitably have life-experiences that may sometimes have some superficial relevance to the cases they hear. Without wishing to be trite, judges hearing family law cases will have their own family experiences. Many judges hearing cases involving schools and hospitals as parties will have experience of such establishments (whether as parent, patient, member of governing body or board or in some other capacity). Of itself, such experience cannot properly give rise to any concern. There has to be something more to cause the fair-minded observer to consider that a possibility of bias had arisen. What that "something more" will be is far harder to define and will inevitably be case sensitive.

49. In the present case, a number of factors initially relied on by the Claimant as material to the question of apparent bias can be discounted because, upon investigation, it transpired that the Employment Judge was unaware of them; the fair-minded, informed observer would realise that such matters could not have influenced him and her concerns as to the possibility of bias would have been dispelled (**Locabail**; **Hamilton**). Thus, the fact that the Head Teachers of the schools might have met at termly meetings or at other times was simply not known to the Employment Judge and could not have given rise to any link that might have (consciously or subconsciously) influenced him in any way.

50. Similarly, certain other possible links between the schools are, on the issues arising in this case, simply not material. The fact, for instance, that both schools might have drawn down standard policy documents from Babcock 4S would not cause the fair-minded and informed observer to be concerned as to the possibility of bias as this was not a case (unlike **Hamilton**) where adherence to a particular policy or line was of relevance.

51. Having made these observations, we note, however, that these points highlight why it would have been better if the Employment Judge had disclosed his school governor role to the parties at the outset of the hearing. He may have been satisfied in his own mind that no possibility of bias arose but he would not have known the precise extent of the issues arising in the case and disclosure would have enabled the parties to address him on this point. Such disclosure would also have permitted investigation as to the possible links between the schools, for concerns to have been considered and potential misunderstandings as to possible links to be resolved. We appreciate that this may sound like a counsel of perfection and we do not seek to suggest that those fulfilling a judicial role have to provide some form of narrative of their personal history before hearing a case; it is always a question of judgment, although we have no doubt that Judges should err on the side of caution in this respect.

52. In the present case, while we think it would have been better had the Employment Judge disclosed the fact of his role as a school governor, in a case in which a school governing body was a party, we do not consider his failure to do so vitiated the ET's decision; it would not, of itself, cause the fair-minded, informed observer to fear that there was a possibility of bias. We turn, therefore, to the other factors relied on as material in this case.

53. The starting point for the Claimant's submissions before us was the importance of the relationship between the Head Teacher of a school and its governing body, particularly its chair. This was relevant, it was submitted, because this case involved a straightforward choice between the evidence of the Claimant and that of the Head Teacher.

54. Although we agree with the Respondent that the ET's reasons disclose that reliance was not simply placed on the oral testimony - the findings clearly refer to the contemporaneous

documentary material - we accept that a view as to the credibility of the different witnesses was nonetheless of significance. Would the fair-minded and informed observer consider that the view reached might have been tainted by the appearance of bias?

55. Having informed herself of the nature of the relationship between a school governor/chairman of governors and the Head Teacher, that observer would understand that it was one of "partnership", in the nature of being "a critical friend", but would also appreciate that governors (and their chairman) would need to "be capable of independent thought" and would know that their decisions "must not be made just to please other people, even the head teacher". Having thus informed herself of the nature of the relationship, we are satisfied that the fair-minded observer would not consider that this gave rise to any appearance of bias. A school governor (or chairman of governors) does not thereby hold a brief for Head Teachers. They may work in partnership with them in the running of the school but they remain independent.

56. Similarly, we do not consider that the fair-minded, informed observer would see any real possibility of bias arising from the fact that the Employment Judge himself carried out the role of school governor and was having to form a view as to the credibility of others who also carried out that role (at a different school). To the extent that he had to form a view as to whether delays might arise when voluntary roles are carried out alongside a person's main occupation (a point arising in this case), there would be no reason to think that his personal experience as a school governor would inform the conclusion he reached more than any other real world experience that he might have. It is almost inevitable that those holding judicial office will have experience (whether positive or negative) of institutions which rely on volunteers. The fair-minded, informed observer would not consider this to give rise to any

appearance of bias. There is no reason why that view should change just because the judicial office-holder themselves acts as a volunteer in the same sector.

57. So far we have considered the factors that might be said to arise simply from the fact that the Employment Judge was a school governor (or chairman of governors). We are clear in our view that no appearance of bias arose on this basis. Indeed, so much is effectively conceded by the Claimant's acceptance that the informed observer would not consider there was any possibility of bias simply because the Employment Judge was a school governor and this was a case in which a school governing body was a party.

58. We turn then to the question whether something more arose on the facts of this case; some material link or commonality of position that would cause our fair-minded observer to consider that a possibility of bias had arisen. So doing, we think that the issue that most obviously requires scrutiny arises from the fact that the two schools in question are both situated in Surrey, under the ultimate control of Surrey County Council and, as a result, both benefitting from advisory services from Babcock 4S.

59. These factors have been the subject of investigation by the parties and scrutinised in the submissions made before us. We are thus well placed to view these matters objectively as informed observers. Doing so, we are quite clear that no appearance of bias is disclosed.

60. The fact that both schools are located in the same county leads to no more than a geographic coincidence. The County Council plays no part in the day-to-day management of the schools; indeed, the Employment Judge can recall no dealings with the County Council save as might have arisen from the fact that he is a Surrey resident. True it is that Shalford might

call upon the legal defence services of the County Council should it be involved in litigation at some point but that eventuality has not - so far as the Employment Judge is aware - arisen; there was no common legal strategy; no contact with the Potters Gate legal team.

61. As for the advisory and training services provided through Babcock 4S, the Employment Judge may have attended the standard courses for school governors and Shalford may have used some of the standard Babcock 4S policies available to Surrey schools, but there is nothing to suggest that this would have given rise to any appearance of bias in this case. No potential common interest in a particular line or policy arose (in contrast to **Hamilton**); there was no contact between the Employment Judge and the Babcock consultant involved in the case; his training never coincided with that of any of the Potters Gate governors and, so far as he was aware, he had never met any of the governors from that school before he heard this case.

62. Having considered the various factors individually, we stand back and ask whether the fair-minded and informed observer would perceive there to be a possibility of bias taking all those factors together. Doing so we remain satisfied that she would not. We think Mr Kirk is right to see the factors relied on in this case as analogous to circumstances such as service or employment background or membership of a social or charitable body (see **Locabail**): life experiences that will not, without more, give rise to proper objection. Having scrutinised all the material facts in this case (individually and taken together), it is apparent that there is nothing more. We can understand that the Claimant felt the need for assurance once she learned of the Employment Judge's other role as a school governor for another Surrey school. Equally, however, we are satisfied that, on any objective assessment and once in possession of the relevant facts, no possibility of bias in fact arose in this case. We dismiss the appeal.