Appeal No. UKEAT/0217/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS V BRANNEY

MRS M V McARTHUR BA FCIPD

EAST OF ENGLAND AMBULANCE SERVICE NHS TRUST APPELLANT

MRS J SANDERS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SARAH CROWTHER (of Counsel) Instructed by: Mills & Reeve LLP 1 St James Court Whitefriars Norwich Norfolk NR3 1RU
For the Respondent	MRS JUDITH SANDERS (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

An Employment Tribunal heard evidence and submissions on a preliminary issue of disability, and retired to consider its decision. It then researched the Internet, without prior reference to the parties, to ask a question about whether there had been no obvious prior issue between the parties (the Claimant being a litigant in person). It was unclear why it had done so, since what was found was of dubious relevance, though it may have appeared it was trying to find evidence which might favour the Claimant. Having returned into the hearing, it told the parties what it had found out. It then asked further questions, appearing to accept uncritically the accuracy and reliability of what had been discovered. It rejected an application to recuse itself, but did so in terms which, when added to those of comments made on an affidavit filed for the Appellants, indicated to the Appeal Tribunal that it had an animus toward the Appellant, not least by appearing prepared to criticise a consultant psychiatrist joint expert for not having approached his examination of the Claimant properly, when there was no evidential basis at all for this criticism.

The Employment Tribunal appeared to think it was free to conduct its own research into the facts surrounding what had happened.

Held: It should not have tried to obtain its own evidence; the role of an Employment Tribunal is accusatorial, and assisting litigants in person to give the best evidence they would wish to give to make their case should not be confused with making a case for such litigants which they have never tried to make. The Employment Tribunal here descended impermissibly into the arena, compounded that by making comments to the Employment Appeal Tribunal seeking to construct arguments (here in support of the Claimant) rather than stating facts, and appeared from what it said to be hostile to the Appellant. The appeal was allowed.

At one stage the Employment Tribunal said that what it had done by accessing the Internet had done no harm to anyone, whereas to the contrary it had exposed both parties to the costs and expense of an appeal, and significantly delayed the resolution of a case the Claimant wished to be resolved as soon as possible.

Observations made about the need for advocates before the Employment Appeal Tribunal to mark authorities to show the passages to be relied on.

UKEAT/0217/14/RN

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. A Judge's job is to adjudicate impartially on a dispute between the parties in the case before him. It is not to advocate the case for either.

2. This case concerns an appeal against a Tribunal where it is said that the Tribunal lost sight of that essential distinction and, having retired, went on to the Internet to research an aspect of the evidence which might have been but had not been given by either party, apparently to see if that might help the case of the Claimant. It indicated upon return to court that it had done so and behaved in a way which indicated it took a determined view that the information it had elicited from the Internet was accurate and in some way relevant and might assist the Claimant, putting itself in a position from which it should have acceded to the application for recusal which followed.

3. The hearing was before Employment Judge Prichard, Mrs Conwell-Tillotson and Mr D Ross at Norwich. The Claimant had made a complaint that she had been discriminated against and unfairly dismissed. It had been agreed that a preliminary issue was whether she was, as she claimed, disabled within the meaning of the **Equality Act 2010**. That issue was heard on the first day of what was to be a six-day hearing. The Claimant was not represented. By contrast the Respondent employer was represented by both solicitor and Counsel. The disability which the Claimant asserted was that she suffered from the symptoms of depression. She had been ordered to set out, in advance of the hearing, what adverse effects this had on her normal day-to-day activities. She prepared a statement, acting for itself, which in broad terms said very little about the adverse effects though quite a lot about what had caused her to have the depression she did.

4. At an earlier case management hearing it had been agreed and ordered that there should be a single joint psychiatric expert. Three names were advanced, of which the Claimant chose one. She did report a number of symptoms to the psychiatrist, who recorded them in his report, a Dr Davidsson. He gave a report. It was ordered prior to the hearing that it was not necessary that he should be called to give evidence. In summary, he concluded that the Claimant indeed suffered from depression but the depression was mild and that, in his view, at the time relevant to her claims her depression did not have a significant effect upon her normal day-to-day activities.

5. In the usual way, and in accordance with the new rules, the Claimant's statement stood in evidence. The Judge, however, asked a number of questions to adduce from the Claimant what she had to say about the way in which the depression affected her from day-to-day. It was a depression which had a long history. Initially the Claimant had suffered after the birth of her first child and again at the birth of her second in 2000. It recurred or was exacerbated by a back injury she had at work in 2010. She was prescribed anti-depressant medication for that (citalopram, a well-known anti-depressant of the SSRI class), and propanolol for anxiety.

6. In the course of answering the Judge's questions, she volunteered that she had taken one tablet of some 80 mg strength per day. When she was cross-examined about the evidence by Ms Crowther, Counsel for the Respondent, she willingly accepted that in fact she had taken probably three, maybe four tablets, each of 20 mg strength. A curiosity was that although the drugs had been prescribed early on in the history of her depression, there had been no prescription of citalopram since mid-2010 but she had gone on taking it until the end of 2012, some two-and-a-half years or so after the prescription to supply it ceased. That was because, it turned out, she did not take the full prescribed dose regularly and had a sufficient backlog in her

cabinet to go on taking some of what remained until the end of 2012 after which she stopped. As a matter of comment, relevant to what follows, we would say that it left it uncertain precisely how much chemical medication she was taking at any particular time during this history. It must, however, have been significantly less on average that the dosage prescribed.

7. The evidence on the question of disability ended in the course of the first day. The parties made their submissions upon it. The Tribunal retired in order to discuss their conclusion. At that stage, and without prior reference to the parties, it began to conduct research on the Internet. At least one of those enquiries, it may have been only one, was to ask about the dose of citalopram. It looked at Wikipedia. The issue of dosage had not been raised by either party, save in the question and answer which we have mentioned which gave rise to no obvious issue.

8. The Tribunal then returned into the hearing room. It told the parties what it had done, and the Tribunal accepts that the affidavit of Rebecca Cockerill of Mills & Reeve Solicitors, acting for the Respondent, is an accurate record of what took place. That records that the Judge said that an "issue" had come up in respect of the dosage the Claimant was on. It was exactly what they did not expect to find, and it would be wrong for them to go off on a frolic of their own, but it was of concern that the Claimant appeared to have been prescribed the maximum dosage of citalopram. Three printouts, one from Wikipedia, one from a South African electronic package inserts website, and one from www.drugs.com, were then passed to the parties.

9. The Judge then started making enquiries of the Claimant as to what she had been told about the prescription by her GP when she was first prescribed it. He asked whether she was

aware that it was the highest dosage. We note (it is one of Ms Crowther's points) that that assumes that that was the case. She said that she was told it was the highest dose and was aware that once it stopped working the GP would have to put her on something else, and that her GP had mentioned it in passing. Next question: "Did he describe you as severely depressed?" The Tribunal Judge persisted in asking that question, which might be thought leading if asked in a traditional courtroom, not once but twice. On each occasion the Claimant did not accede to the implicit invitation to agree that she had been told she was severely depressed.

10. Ms Crowther was given overnight to consider her and the Respondent's position. In the morning following she made an application that the Tribunal should recuse itself. It had exceeded its role in investigating evidence for itself, which neither party had sought to put before it, and had assumed the truth of that which it had itself uncovered from the Internet.

11. The obvious question arises: why the Tribunal did what it did. Unfortunately we are left entirely unclear as to what precisely the Tribunal made of the evidence and why they thought the dosage was relevant at all. It said a number of things which appear on the face of them inconsistent. At paragraph 5 of its Judgment it said that it thought it of interest to know the dosage. That may be, but that is no basis upon which to regard the issue as being one on which evidence was needed. On the face of it, the dosage might have given some indication as to the GP's reaction to the way in which the Claimant presented at that time. That in turn might indicate whether the Claimant in fact at that time did suffer from a depression and might indicate something of the severity of it. But these are tentative conclusions, which would depend on the general practice of GPs in prescribing this drug, whether that prescription was and would be generally appropriate to someone in the Claimant's position, what symptoms the

Claimant actually had at the time, and the likely effect of the citalopram upon it. What the evidence in the state it was simply could not answer was what, if any, effect taking the drug had at the relevant time, which was after the prescriptions had ceased, because as we have indicated there was no certainty whatsoever about what the Claimant was taking.

12. There was an agreement by her in evidence, and it was noted by Dr Davidsson, that after stopping taking such dosage as she took at the end of 2012 she was no worse as a consequence. Accordingly, as it seems to us, the amount of the drug that it was prescribed that the Claimant should take prior to 2010 does not seem obviously relevant to any issue which the Tribunal had to decide, but the Tribunal obviously thought that it might be even if it described the matter as being one purely of interest (paragraph 5) because it thought (paragraph 9) that the joint medical report lacked information on the dosage and what would be considered a high or a low dosage. It said in paragraph 10 that it accepted it would be wrong for the Tribunal to venture a medical opinion on the issue of dosage other than to observe that the dosage appeared to be the maximum. What matters is not whether it was the maximum (if it was) but what inference could properly be drawn from that fact if any could. But the Tribunal here was recognising that it simply was not in any position to draw any such inference.

13. At paragraph 17, however, disturbingly it said it would decide the case on the evidence it had heard including evidence that the Claimant was apparently prescribed the maximum dose, for whatever reason, even though she did not take it. In accordance with the practice of this Tribunal, upon receipt of an affidavit setting out the facts upon which the Appellant relied in support of its allegations of actual or apparent bias or procedural irregularity, the Tribunal was asked for its comments. The Tribunal appears to have accepted this invitation as an invitation to make pejorative remarks. It did not simply deal with facts. Tribunals should understand that

when they are asked by the EAT to provide their comments on an affidavit asserting facts from which bias or irregularity may be inferred, they are being asked about the facts of what happened. A fact may of course include the reason why the Tribunal acted as it did. What it does not extend to is argumentative matter, commenting upon the motives of, or casting aspersions upon, a party before it. Its role is to give a factual report which will agree with or correct the facts set out in the affidavit of the Appellant. Unfortunately, as it seems to us, the Judge did not entirely see his role in this limited factual sense. In the response, there was further consideration as to why the Tribunal had looked to take evidence in respect of dosage for itself. It said that the medical report was inadequate (paragraph 6), and that (paragraph 14) the Tribunal was confused by the dosage evidence:

> **"Even after cross examination [the Claimant] was still saying she remembered taking 3 or/ 4 x 20 mg tablets."**

We do not understand quite what the confusion was, since that was the proposition which had been put to her by Ms Crowther and she had agreed to it. It said, "The tribunal looked up the dosage on the internet as a cross check". At paragraph 17 it observed:

> **"The tribunal noted with surprise that [the Claimant] had been prescribed the maximum dose."**

We were unsure why there was any room for surprise. In paragraph 19, it said it:

> **"...was not about to draw a medical conclusion from the dosage, which would be wholly improper."**

It then went on to say this:

> **"What [the Claimant] had to say, however, was of interest and she gave *indirect medical evidence* of what her GP said about it being the highest dose and that 'once it stopped working he would have to put her on something else'... That could suggest that this medication was not having much effect anyway."** [emphasis added]

Whether the Tribunal regarded that as medical evidence in respect of dosage is unclear.

14. In the light of all that we simply do not see what particular relevance this evidence had, but assuming it to have had some potential relevance, the question emerged, in the submissions before us by Ms Crowther, whether the Tribunal had had any right or function to obtain evidence for itself on this particular point.

15. There are three grounds of appeal. The first was that a Tribunal is not permitted to consult the Internet. The second was that the Tribunal should have recused itself upon the Respondent's objection to it searching the Internet. And the third was that in what took place (including the nature of the response which the Judge has given on behalf of himself and the other members of the Tribunal) there was an appearance of bias.

16. She argues that a Tribunal cannot and should not, properly, conduct Internet research for itself. To do so is to come down on the wrong side of the line between remaining impartial but assisting a witness to do the best that they can in evidence and, on the other hand, entering into the arena.

17. The distinction between the two is demonstrated, submitted Ms Crowther, by a case such as **Yuill v Yuill** [1945] P 15. In the course of that appeal Lord Greene MR said this:

> **"A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."**

Those last comments give something of the flavour of the factual evidence in that case. It was a divorce case. There were advocates on both sides. It was conducted before the civil courts in

1944. The context is therefore different, as it seems to us, from that which applies before an Employment Tribunal, as to which we will later say more.

18. In **Jones v the National Coal Board** [1957] 2 QB 55 a Judge was said to have intervened significantly during the course of the evidence. Lord Denning MR, giving the Judgment of the Court of Appeal in deciding that the Judgment could not stand, said:

> **"In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question "How's that"? His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role."**

19. He quoted the passage from Lord Greene and his graphic phrase about having eyes clouded by the dust of conflict, and then, at the top of page 64 said:

> **"Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the "nicely calculated less or more" - but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties... so also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other...the judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"**

20. She argues that those principles, though expressed in relation to the civil courts, in the different contexts of the two cases, and in particular referring to a forum where there are forensic gladiators acting for both sides who can trade blows with equal force and knowledge, is nonetheless the approach which should be taken in Employment Tribunals too. In **McNicol v Balfour Beatty Rail Maintenance Ltd** [2002] ICR 1498 the Court of Appeal considered a case

which like this related to a complaint of disability discrimination. The appeal against the Tribunal's finding was dismissed. But in passing, the Court whose ruling was delivered by Mummery LJ commented upon a particular submission which had been made to it. At paragraph 26 he said:

> **"As to the function of the tribunal it was submitted that it should adopt an inquisitorial and more pro-active role in disability discrimination cases, as they can be complex and involve applicants, whose impairment leads them to minimise or to offer inaccurate diagnoses of their conditions and of the effects of their impairment. I do not think that it would be helpful to describe the role [of] the Employment Tribunal as 'inquisitorial' or as 'pro-active.' Its role is to adjudicate on disputes between the parties on issues of fact and law. I agree with the guidance recently given by Lindsay J in** *Morgan v. Staffordshire University* **[2002] IRLR 190 in paragraph 20. The onus is on the applicant to prove the impairment on the conventional balance of probabilities. In many cases there will be no issue about impairment. If there is an issue on impairment, evidence will be needed to prove impairment. Some will be difficult borderline cases. It is not, however, the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers."**

21. The danger, submitted Ms Crowther, of a Tribunal discovering evidence on a frolic of its own was that it was less likely to be viewed dispassionately and objectively. The answer to the Judge's question is likely to be given greater weight than if the Tribunal sits objectively, dispassionately, impartially assessing the questions asked by the advocate or the litigant in person of the witnesses for the opposing party.

22. The Tribunal, in rejecting the application for recusal, referred to Rule 41 of the **Employment Tribunal Rules of Procedure**. That said:

> **"The tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The tribunal shall seek to avoid undue formality and may itself question the parties or any witness so far as appropriate in order to clarify the issues or elicit the evidence. The tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

23. In its Judgment and again in the comments, it is plain that this Tribunal saw its role as partly inquisitorial. The danger which this gave rise to, submitted Ms Crowther, was that the Tribunal might credit evidence from the Internet with a weight which it simply could not bear.

Having discovered it for itself, this could be a danger. The Tribunal here appeared to fall into that trap because it spoke (see the comments) of "knowing" that the dose was the maximum dosage, and it asked questions of the Claimant which were based on an uncritical acceptance of the information it had obtained.

24. She pointed out that, in academic articles, the use of the Internet as a source of reliable information on medical matters had generally been questioned. Though the wisdom of the crowd, as she put it, might be of assistance on matters which were much more common knowledge: geography, slang and the like, this was not the case with medicine.

25. In an American case which I am told was before the Supreme Court, **NYC Medical and Neurodiagnostic v Republic West Insurance Co** 2004 NY Slip Op 24526, the court considered a case in which the lower court from which the appeal came had had to decide whether the state court had jurisdiction over the particular issue. It would have had if the defendant insurance company had been licensed to do insurance business in that state. That was denied in evidence before the court. The court, having retired, conducted its own Internet research. That led it to think that, contrary to its denial, the Defendant had been licensed to do business for some time before the events which gave rise to the claim. The appellate Court thought that the burden of proof lay upon the party seeking to assert that jurisdiction had been properly obtained. This research had caused the court below to ask the wrong question, as if the burden of proof were in fact on a Defendant. In conducting its own independent factual research:

> **"...the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity [sic] to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability..."**

26. It is obvious, and Miss Sanders whose submissions have been both short and frank does not dispute, that the Internet may be an unreliable source. It is obvious because what is put on the website is rarely vouched by an author; the date of it may be difficult to obtain; there may not be the balance which there needs to be if the matter is objectively to be determined; and particularly in respect of medical or medicinal matters, entries are frequently overlaid by the commercial considerations of those involved in the lucrative trade in remedies. All of this gives rise to considerable risk in drawing any firm conclusions from such material.

27. In making those submissions as to the way in which the Tribunal should have behaved, Ms Crowther rolled together what were grounds 1 and 2 and touched indeed upon what was her third ground, that of the appearance of bias. Here she gently and courteously suggested that in the way in which the Tribunal had dealt with her application and the response, it had indicated what she described as "slight animus" toward the Respondent. Ms Sanders, in her response, said that she understood where Ms Crowther was coming from. We did not understand that she disputed any of the central facts as to what happened. She emphasised, however, her concern for her own position, entirely understandably, looking to regain a degree of self-esteem and a fully remunerative job in the field that she really enjoyed, from which she was dismissed by the Respondents, and her desire to have a resolution of her claims as soon as that could be achieved fairly.

Discussion

28. First, we accept entirely that the cases to which we have been referred, with the exception of **McNicol** are cases which describe the adversarial procedure as it was some time ago, in courts in which the full rigour of court rules and procedure applies and in which the parties were represented. Tribunals were designed to provide swift, informal justice to ensure access to

justice with a degree of simplicity that would assist ordinary people, with no particular legal expertise, to vindicate their rights. It is part of the culture of a Tribunal that it will become familiar with people who have no legal training and who may find the whole process of going to law distressing and certainly difficult to navigate without having any experienced person to turn to. Inevitably it will seem that they are at a disadvantage when confronted by the legal team instructed by another party. A Tribunal, given its origins, has to be sensitive to that. This may, however, lead to a fudging of the boundary which must be kept between that which a Tribunal is obliged to do, that which it is not obliged to but can do, and that which it has no right to be doing at all. The proceedings are not inquisitorial, as this Tribunal seemed to think. A broad view of the rules demonstrates that immediately: to start a case it is necessary to make a claim and say sufficient about it in an originating application. It is that to which the Respondent will respond. If an amendment to the claim is needed, permission has to be asked for and obtained. These are matters of some formality. They need not be overcomplicated, but they indicate that the process is designed to identify what is the real dispute between the parties so that a Tribunal, acting as an umpire and not as a participant in a courtroom battle, can fairly resolve it.

29. Rule 41 does not, in our view, allow a Tribunal to make enquires on its own behalf into evidence which was never volunteered by either party. The Tribunal may, in an appropriate case, ask the parties whether they have thought about particular evidence or even, possibly, whether in an appropriate case the parties or one of them would wish an adjournment in order to obtain it. But it is not, as the Judge appeared to think, for the Tribunal itself to investigate the evidence and rely upon its own investigations. The Tribunal is, as we said at the start of this Judgment, to act as the adjudicator not as advocate. Actively seeking fresh evidence on one or other party's behalf is inevitably likely to lead towards the latter.

30. In **McNicol** the Judgment falls short of saying that a Tribunal must not act inquisitorially in some respects, though it is clear that it is authority that there is no duty to do so. It is important that the obligations of a Tribunal to deal sensitively with litigants in person and those who may be vulnerable for one reason or another, not least through mental illness, should not be confused with adopting an inquisitorial procedure. It is the role of the Judge to ensure, by making proper allowance, by ensuring that the form of questioning by one side or the other is appropriate, by controlling the amount of time that a witness is in the witness box and, as Rule 41 itself suggests, asking its own questions, that a witness gives the best evidence that that witness would wish to give. It remains, however, that witness's evidence. It is that witness's case. It is not the Tribunal's case. It is not the Tribunal's evidence.

31. Accordingly it is quite likely that there will be a degree of intervention in proceedings before a Tribunal which might raise some eyebrows in civil courts. But the purposes, as we have identified them, should be kept clear. When a Judge does under Rule 41 ask questions to elicit the evidence - that is, not the evidence which the Tribunal wishes to hear but the evidence which the witness wants to give, as best the Tribunal can understand it - it is advisable that the Tribunal asks those questions in a non-leading form. That is not because form should triumph over substance. It is because non-leading questions give rise to the most reliable answers. If a Judge suggests an answer to witnesses, they are much more likely to agree with it than they would if asked an open question about the same point, and the Tribunal should be careful to avoid making a case for either party.

32. The Tribunal will begin with a complaint before it. It will wish to understand why the complaint had been made, and what are the main reasons for it. It will wish to ensure clarity. There may be a need to explain procedure to the witness and to explain what the purpose is of

the enquiry which the Tribunal is making. This is best done in simple terms, however sophisticated the witness may be. But it is not the role of the Employment Tribunal to find evidence to support one party's case or the other. Adjudicating upon the evidence put before it is not producing the evidence for it to consider.

33. All that said, in this particular case, it is therefore plain that the Tribunal should not, without at least giving the parties an opportunity beforehand to deal with it have asked whether the question of dosage was important, first of all; what it was relevant to, second; and what the evidence might be, third, to begin the enquiry.

34. In accessing the Internet, it did what in our view it should not have done. In the criminal courts (see **Attorney General v Fraill and Sewart, R v Knox** [2011] 2 Cr.App R 21, page 271, and **Attorney General v Davey** [2014] 1 Cr.App R1), the fact-finders - jurors - are reminded at the start of every trial that they should make their decision upon the evidence which is put before them. That is why, having given an oath to do that, they may be guilty of contempt of court as these cases show if they access the Internet to attempt to uncover relevant material. The danger is that the prosecution and defence simply do not know what the information they have received which might influence their decision. The point here is the same. It was a procedural irregularity to do it – just as in the criminal court, all evidence is (in the normal run) received in public, so (in the normal run) ought all evidence to be gathered in public in an Employment Tribunal. Article 6 talks of a hearing in public. It is not in public if it involves accessing the Internet privately.

35. An irregularity such as this may (just) be remediable, at least in the context of an Employment Tribunal. Whereas part of the vice in a criminal case is that the parties will simply

not know what a jury has heard or read, and the American case of **NYC Medical** was likewise one in which there was no reference back to the parties after the Internet had been accessed, and before Judgment was delivered, this case is different. The Tribunal, quite properly, told the parties what it had done almost immediately after it had accessed the Internet. The danger, therefore, of reaching a decision without the parties having had an opportunity to address the issue was avoided. Accordingly this, in our view, was at the outset a procedural irregularity which might have been retrievable. The trial might not have had to be re-run if the matter had simply been reported, fully, time given for submissions and consideration if further evidence was needed. I would not wish in the least to encourage a Tribunal in other cases to proceed, thinking the matter could be retrieved: if it thinks it has not been informed of important evidence it should ask the parties about it. However, the resolution of this case depends to a large extent on what happened after the Tribunal revealed the irregularity.

36. We have been persuaded, in the event, by the submissions of Ms Crowther that, in assuming the truth of that which the Tribunal had discovered for itself from the Internet, as the comments and Judgment suggest it did, and in raising further questions for the Claimant to answer as if the material were true, the Tribunal fell into the error of demonstrating that it would place improper weight upon the material it had obtained.

37. Finally we turn to the third and in many ways the most concerning aspect of this case. The third ground asserts the danger of the appearance of bias. The approach is well-known, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased (see **Porter v Magill** [2002] 2 AC 357 at paragraph 103).

38. The danger here arose because of the position in which the Tribunal put itself, suggesting that it was not careful as to the role it should adopt and the impartiality which it should show. The **Bangalore Principles of Judicial Conduct 2002** emphasise at Article 2.5 the importance of a Judge appearing impartial. Article 6 of the European Convention on Human Rights reads:

> **"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.**

As Mummery LJ said in the case of **AWG Group Ltd v Morrison** [2006] 1 WLR 1163:

> **"...the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."**

39. In a case which has some similarities to this, that of **Begraj v Heer Manak Solicitors** [2014] ICR 1020 the Appeal Tribunal thought that a Tribunal was entirely right to recuse itself when it had received information from an extraneous source, which in that case too it revealed to the parties, but in that case only after a week further sitting.

40. Here we have material before us which indicates that there is considerable force in what Counsel says about the way in which the Tribunal viewed the Respondent. Not simply is it that the Tribunal were seeking to make a case for the Claimant because, perhaps, it felt that she was not very well able to make the case for itself, but it referred to a rather uneven debate (paragraph 14), and complained about the forensic style of cross-examining which had been adopted by the Respondent; to which the answer should be that the Tribunal has a duty to case manage, part of which involves ensuring that questioning, particularly of witnesses who may have vulnerabilities and anxieties, is conducted clearly, succinctly and without unfair badgering. The Tribunal had the power. If it thought there had been an error, it should have exercised it. It was blaming the Respondent for something which was its own job to control.

41. The Tribunal criticised the Respondent for not having offered it and delivered the medical records of the Claimant. It did not know that there had been something of a history to this in which the Claimant had at one stage, though not latterly, been reluctant for the medical records to be revealed since they contained some personal details. But, be that as it may, we are told today without contradiction that the Tribunal never actually asked for the records. It had the power specifically within the Rules to require those records if it thought it needed to see them. It instead complained that Counsel had not offered them, placing the responsibility for this on the Respondent whereas in truth the responsibility actually rested on the Tribunal.

42. In its concluding remarks, in paragraph 13 of the response, it said that at least the Claimant could have been asked if she was prepared for the medical records to be shown to the Tribunal. This is said as if it was the Respondent's duty to ask the question. It was the Tribunal's to investigate the matter with the parties, and if it still felt it needed to see the documents to come to a fair decision, order their disclosure, and they never did.

43. It seems to us, therefore, that to that extent the Tribunal was blaming the Respondent for what was in truth its own failure to adopt its responsibilities.

44. Further, we are a little concerned about paragraphs 4 and 5 of Judge Prichard's comments in which he said:

> **"4. As it seemed likely that [the Claimant] was going to have to conduct her own response in the EAT, there is more discussion, *self-justification* and reasoning in the tribunal's judgment than in the average judgment. That is because it is harder for a lay person to defend a tribunal's judgment (if that is what [the Claimant] wishes to do in this case).**
>
> **5. I am assuming [the Claimant] would want to defend the tribunal's judgment." [**emphasis added]

This can be read as the Tribunal seeking to make a case for the Claimant because it felt that the Claimant was not best able to do it for herself. It went on to talk about the "inadequate" medical report and said, in respect of its author on whose report the Respondent relied, who was a joint witness, that he had not been "...sufficiently proactive and searching in his examination of JS". That assumes that there was evidence to that effect, which there could not be because there had been no other medical evidence. It was an unjustified comment. It tended one way.

45. It is unnecessary to traverse the whole of the Judgment and the commentary. We have highlighted some of the points which stand out to us. The conclusion we have sadly reached is that the Tribunal took an attitude, possibly in reaction to the criticism of its accessing the Internet for itself, which it thought it was entitled to do, that to an extent appeared to be hostile to the Appellant. It seems to us that this Tribunal, for those reasons, cannot continue to hear this case.

46. We have two further comments to make before we shall deal with the consequence of our decision. The first is this. No real conflict should be caused by being sensitive to ensure that vulnerable witnesses and lay witnesses, just as much as more sophisticated or professional witnesses, are treated with proper sensitivity before a Tribunal and are assisted by the Tribunal, both by its own questions and by controlling the questions asked by the other party, to give the best evidence that they would wish to give in support of their case. There is no conflict between that and the accusatorial system. It nonetheless requires a degree of care by a Tribunal. In assisting one party, it should be cautious not to cross the line between impartiality (which it must maintain) and acting as an advocate (which it must never do). But generally it will be plain when the Tribunal has fallen on one side of the line or the other.

Bundle of Authorities Before the Appeal Tribunal

47. The next comment does not relate to the substance of the appeal. It relates to procedure before this Tribunal. It is simply the misfortune of the parties that is an appropriate case in which to emphasise a point, for the benefit of the Appeal Tribunal, and guidance of cases which follow.

48. The bundle of authorities consisted of 21 extracts from cases, statutes, regulations and other materials. It was compiled appropriately chronologically and tabulated, as the **Practice Direction** requires and as indeed the usual order made by this Tribunal requires of parties. Unfortunately there was no marking of the passages which were to be relied upon. It is unfair to a litigant in person, especially if such a bundle is prepared by a professional, because although a fellow professional may be able to pick it up, it can be very difficult for someone without legal expertise to know what point emerges from a particular case, and where within the case, and to understand where at least they should start looking or on what they may wish to seek advice. It is of considerable importance, too, where the bundle is prepared by a lay person, for experience shows that the point to be raised from an authority may not always be obvious without being guided to the passage relied upon: and the other party may, again, be a non-professional.

49. There is a second real practical advantage in marking passages. The lay members in this Tribunal often cannot be sent a bundle of authorities in advance because of the practical problems of postal delivery. They get the papers for the case at home, but rarely the authorities. They will pick those up in good time for the hearing on the night before or the morning of the hearing. It is of particular assistance to them that the relevant passages be identified in advance. It makes for speedy focus on the central points.

50. Unfortunately for Ms Crowther she stands in the firing line of this comment in what I have little doubt will be a reported case. It should not be thought that the fault is entirely hers. The reason for making this observation is that it happens too often. Word is going round, but many representatives, many of whom are senior, do not take the responsibility which they should to ensure that this matter of practice and order is fulfilled. Ms Crowther has apologised fully and we entirely accept that apology. Other Counsel in other cases have equally apologised. What the profession generally should know is that the Judges in this Tribunal are clear that, if there is an occasion in which it might work some injustice in the future, a party turning up to pursue an appeal and wishing to rely upon a bundle which has not been marked may be required to mark all the bundles before the case begins here, and must be prepared to give sufficient time to the party on the other side, especially if a litigant in person, to consider those passages. If this gives rise to a risk, which it may in some cases, that the matter is part-heard or adjourned when it would not otherwise have been, then they must be prepared in due course to defend any application for costs which results.

51. I feel confident that with this further emphasis of what is required, the parties will generally comply, just as I am sure, given the relatively good presentation of the authorities and the considerable diligence of Ms Crowther in obtaining the material that she could on difficult topics, that the fact that it has led to my observations in this case should be regarded as no complaint which is particular to the parties to it. The point is a general one.

Consequential Orders

52. The consequence of my rulings in paragraphs 1 – 44 is that the case will be remitted to be heard by a fresh Tribunal. It should approach the issue of disability upon the footing that unless either party makes a successful application for the opposite the medical report of Dr Davidsson

will be received in evidence without the need for his attendance. If it is thought by either party that the medical records are, or part of them are, of importance, then they should be sought from the Claimant or Respondent and provided for the Tribunal to consider, though it may be that they are of little help given that there is an expert medical report on the central issue.

53. We would ask that the Tribunal office take whatever steps it can to ensure that the hearing is held as soon as can reasonably be arranged because of the particular circumstances of the Claimant. At one stage the Employment Tribunal said that what it had done by accessing the Internet had done no harm to anyone: to the contrary, it has exposed both parties to the costs and expense of an appeal, and has significantly delayed the resolution of a case the Claimant wished to be resolved as soon as possible.