Appeal No. UKEAT/0165/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 October 2014

Before

HER HONOUR JUDGE EADY QC

PROFESSOR K C MOHANTY JP

MR D G SMITH

GOVERNING BODY OF ST MICHAEL'S CHURCH OF ENGLAND JUNIOR & INFANT SCHOOL	APPELLANT
MRS I SMITH	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS SOPHIE GARNER (of Counsel) Instructed by: Birmingham City Council Employment Tribunal Unit PO Box 15592 Birmingham B2 2UQ
For the Respondent	MR STEPHEN PAGE (of Counsel) Instructed by: Chiltern Solicitors 110 Butterfield Great Marlings Luton Bedfordshire LU2 8DL

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Apparent bias:

Employment Judge's interventions giving rise to an appearance of bias. In particular, his questions of the Appellant's first witness lasted some 1 ½ hours, compared to the 1 hour of cross-examination by the employee's legal representative. His interventions included reminding the witness of her oath in a manner more suggestive of cross-examination than simply a clarification of the meaning of the oath. Further interventions included calling for a document to be adduced into evidence by the Appellant, apparently to make good a point for the employee's case that the employee was not in fact seeking to make herself. Further exchanges with another of the Appellant's witness suggested that the Employment Judge was cross-examining the witness rather than simply seeking to clarify her evidence (i.e. pushing for a "yes or no" answer; putting a point some 4-5 times).

Applying the test in **Porter v Magill** [2002] 2 AC 357, HL, that, having ascertained the relevant circumstances, the court should ask itself *whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*, and allowing that those circumstances might include a certain degree of confusion and uncertainty in the Appellant's case and in its witnesses' answers, the EAT considered that the Employment Judge in this case had crossed the line and descended into the arena such as to cause the fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

Appeal allowed. Case remitted to new Employment Tribunal for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. In this unanimous Decision we refer to the parties as the Claimant and the Respondent, as below. We are concerned with the Respondent's appeal against a Judgment of the Birmingham Employment Tribunal (Employment Judge Gaskell, sitting alone, over five days during the course of 2013, with an additional day in chambers); "the ET". The Judgment was sent to the parties on 27 August 2013; it held that the Claimant had been unfairly dismissed. It further recorded its rejection of the Respondent's application - made at the outset of the third day of the hearing - for the Employment Judge to recuse himself on the ground of apparent bias.

2. The appeal is on three main bases. First, the Employment Judge gave the appearance of being biased against the Respondent, in particular against its Executive Head Teacher, Mrs Sturridge-Packer, throughout the hearing. Second, the Employment Judge substituted his view, as to the reasonableness of the decision to dismiss, for that of the Respondent. Third, the Employment Judge erred in law, in refusing the Respondent's application that he recuse himself; in continuing to hear the case, he failed to consider whether a fair-minded, informed observer would conclude that there was a real possibility that the Tribunal was biased.

3. It is common ground that if we conclude that the circumstances of this case were such that there was apparent bias, the only possible outcome of this appeal is that the Judgment must be overturned and the case remitted for a re-hearing before a different ET. That is obviously an undesirable outcome in many respects but it is the only proper course if we are satisfied that the right to a fair hearing before an unbiased Tribunal had been undermined.

The Background Facts

4. The Claimant was employed by the Respondent ("the school") from 23 May 1998, latterly as its Office Manager, having previously carried out clerical and secretarial positions. Over time, she had obtained an NVQ Level 3 in Business and Administration but had no formal financial or accountancy training. More specifically, the ET found, she had no training as to the operation of the school's financial procedures manual ("the manual"), ultimate responsibility for compliance with which rested with the Governing Body and Head Teacher. That said, as part of her duties, the Claimant had financial responsibilities. She received the official funds for the school (the funds received from the central education budget) and had responsibility for unofficial funds (monies from other sources: parental donations, the uniform shop, school dinner money, extracurricular activities and so on).

5. In 2010, the Respondent school had been placed in special measures by Ofsted. That September, Mrs Sturridge-Packer (someone with considerable experience in education; awarded CBE for educational services) was approached to provide senior leadership support, which she did for several months, during which period the previous Head Teacher, a Miss Wick, resigned. Thereafter, from 26 April 2011, Mrs Sturridge-Packer became Executive Head Teacher of the school whilst continuing as Head Teacher of another school, St Mary's.

6. Mrs Sturridge-Packer was concerned about the administration of the school and arranged for the Office Manager of St Mary's to spend time with the Claimant, albeit, as the Employment Judge found, not assisting with the school's accounting or financial procedures.

7. Occupying a building on the school site was a privately run nursery, "Jellybeans". The school had encouraged the establishment of the nursery and derived certain benefits from its

location on site. There was some sharing of services between the school and the nursery, which had grown over time and generally operated to the nursery's benefit. The previous Head Teacher, had agreed to these arrangements, had been a member of the nursery's management committee and also acted Responsible Officer for the nursery for Ofsted purposes.

8. In May 2011, Mrs Sturridge-Packer was approached by the Nursery Manager and asked if she would become the Responsible Officer. She agreed to do so on a temporary basis (otherwise the nursery would close) but was concerned the nursery appeared to be operating as part of the school, which would be inappropriate and incorrect, and therefore sought advice from Ms Joyce Rawlinson, School Support Manager Birmingham City Council, who identified a number of areas of concern regarding the arrangements between the school and the nursery; in particular, that the school was effectively utilising public funds to subsidise a private nursery.

9. The Employment Judge found there was some form of contractual or quasi-contractual arrangement between the two organisations requiring substantial variation, which could not necessarily be done unilaterally and certainly not without giving notice:

> **"… it was clearly the case that some form of contractual or quasi-contractual arrangement existed between the two organisations and remedying the issues identified by Ms Rawlinson involved a substantial variation of those arrangements which could not necessarily be done unilaterally and certainly not without giving appropriate notice." (paragraph 39)**

10. There was an issue before the Employment Judge as to whether the Claimant had properly carried out her role in remedying matters raised by Ms Rawlinson. The Employment Judge was critical in his findings of the school in this respect; concluding:

> **"40. … No clear instructions were issued to the claimant as to what she should do, no timescales were set and no support was provided as to exactly how the claimant should single-handedly bring about variations to arrangements which had existed between two organisations for many years. There simply seems to have [been] an assumption (including on the part of the claimant) that the claimant would implement the recommended changes.**
>
> **41. The claimant regarded it is as very unfair that she should be left with this responsibility without any clear direction or leadership. There was a clear contradiction in the approach of the School at this time; the claimant knew that the immediate implementation, without notice and without consultation, of some of Ms Rawlinson's recommendations (such as full re-**

> **charges for utilities) would jeopardise the financial viability of Jellybeans, and yet her understanding was that the SMT and the Governing Body wish to maintain the presence of Jellybeans within the School; an understanding which had been reinforced by Mrs Sturridge-Packer's recent agreement to become the Responsible Officer rather than precipitate the closure of the nursery."**

11. In or about September 2011 the Claimant raised an issue with Mrs Sturridge-Packer concerning what she saw as the large amount of cash being kept in the school safe. This either coincided with, or occasioned, Mrs Sturridge-Packer's commissioning of a report from Birmingham City Council's internal audit section (Birmingham Audit), undertaken by Miss Karen Smith under the supervision of Mr Yardley, which was heavily critical of the school's financial arrangements, finding wholesale non-compliance with procedures in respect of the school's unofficial funds; poor or non-existent systems controls and records; poor records of private donations; a failure to account for income for school meals; generally, the school had been exposed to the risk of fraud, theft or misappropriation of funds.

12. The Employment Judge accepted Mr Yardley's evidence: responsibility for compliance with the manual rested with the Governing Body. It had to determine and record how that responsibility was to be delegated and apportioned. As for the Claimant, as the Employment Judge recorded (see the second paragraph 48):

> **"[She] was in no position to contradict the findings of the report and she made no attempt to do so. Her case was simply that she had dealt with cash and the accounts in the way that she had been taught by her predecessor; she had continued with the same systems for seven years after becoming the office manager and had never been subject to any criticism or adverse comment from Miss Wick, the SMT, the Governing Body, Ms Kaur or any City Council officials. It was not until this report that she realised that she had been doing anything wrong; she had not received any specific training with regard to the school finances - training which Mr Yardley reported that he would have expected her to have received and which it was the school's responsibility to provide."**

13. Following receipt of the audit report, the Claimant was suspended, and a disciplinary investigation commenced. On 8 March 2012, the Claimant attended a disciplinary investigation meeting with Mrs Sturridge-Packer. On 2 May 2012 a disciplinary hearing took place before

three members of the Governing Body, chaired by Mr Bagley (albeit that the Employment Judge concluded that the charges set out in the letter inviting the Claimant to that hearing were in such general terms as to be meaningless). Mrs Sturridge-Packer presented management's case. The Claimant was present, represented by a trade union representative. The panel found the Claimant guilty of gross negligence in not following the school's financial procedures and failing to immediately rectify failings found by the audit report. There was a breakdown in trust and confidence; the Claimant did not have the competence for the job notwithstanding support that had been given to her by Ms Rawlinson and the St Mary's Office Manager. These failings had not been addressed by previous management, but the basic problem was that the Claimant was not competent to do her job. She should be dismissed without notice.

14. The Claimant appealed. The appeal was heard by a committee of the Governing Body, chaired by Mr Scott, which reviewed the dismissal decision. It concluded that the Claimant's conduct amounted to gross misconduct. The decision to dismiss was upheld.

The ET Hearing and Reasoning

15. The Employment Judge heard from the Claimant and from six witnesses for the Respondent. At an early part of the Reasons given for the Judgment the Employment Judge records his impressions of those who gave evidence in particular as regards Mrs Sturridge-Packer. Noting that she was clearly "a pre-eminent individual in the field of education" he found her to be unsatisfactory as a witness, see, in particular, paragraphs 7 to 9:

> **"7. As a witness however, … I found her to be most unsatisfactory. She seemed to resent having to appear before a tribunal to answer for her actions. She clearly felt that an assertion on her part was sufficient to establish matters as factually correct. For example, she insisted that the claimant had received all of the training necessary for her to perform her duties to the standard required by Mrs Sturridge-Packer; when asked if the training was documented she insisted that it was but the documents had not been disclosed. When some documents were produced on the second day of the hearing they simply could not be described as "training records" at all.**
>
> **8. Mrs Sturridge-Packer's evidence was confusing and inconsistent with regard to the possible implementation of the respondent's capability procedure to secure improvements which she**

considered necessary to the claimant's performance at work. She was referred to the procedure and confirmed that she was familiar with its contents. The procedure provides for early intervention in the case of poor performance by way of informal discussions followed, if necessary, by the formulation of an action plan to bring about the required improvement. Mrs Sturridge-Packer did not follow this procedure prior to the implementation of disciplinary proceedings; when asked why, her response was that she "*did not consider it to be her place to do so*". I find this impossible to reconcile with Mrs Sturridge-Packer's subsequent conclusion that it was her place to initiate disciplinary proceedings.

9. When challenged on a point, Mrs Sturridge-Packer adopted a series of stock responses - "*I acted in good faith*", "*My priority was the education and welfare of the children*" and that she had, at all times followed advice from HR and local council officials. None of this was in dispute, but it was as though she believed that so long as she had acted with good intentions this somehow absolved her from any responsibility or accountability for her actions. On occasions she became quite tearful suggesting that it was unfair that having acted only in the best interests of the children at the school should find herself tested in a public tribunal. She felt very sorry for herself; but had little insight as to the possible impact on the claimant and her family of having lost her job after 14 years service."

16. He specifically found that Mrs Sturridge-Packer had been untruthful in her evidence and concluded (paragraph 13) that she knowingly embellished her evidence with an intention to mislead the ET as to the extent of the Claimant's culpability.

17. The Employment Judge also found Ms Rawlinson to be an unsatisfactory witness, "reluctant to deal with the questions she was asked by the claimant or by the tribunal". Specifically:

"… The issue then was whether it would be at all reasonable to expect an Office Manager, single-handedly, to make changes to such a relationship [with the nursery] which had evolved over time with the apparent approval of the senior management of the School and its Board of Governors. Ms Rawlinson simply failed to grapple with the point - instead she kept repeating, what was not in dispute, that it was wrong for the school to use public funds to subsidise the nursery. At one point, I asked the same question in several different ways in an effort to elicit an answer as to how such matters could be changed unilaterally; Ms Rawlinson failed to answer." (paragraph 14)

18. Similar adverse observations were made as to the evidence of some of the other witnesses called by the Respondent, including Mr Bagley and Mr Scott.

19. In contrast, the Employment Judge found the Claimant to be a truthful and compelling witness. He also found the evidence of Miss Smith and Mr Yardley (from Birmingham Audit) had been consistent and compelling.

20. During the course of the hearing the Employment Judge had to make certain interim decisions. On day two, he refused to admit (as irrelevant) supplementary examination in chief of Mr Yardley as to how other schools apportioned responsibility for compliance with the manual and what expectations they had of their Office Manager. Further, at the outset of day three - after two days of hearing and after the case had gone part-heard for some two months - he had to determine an application by the Respondent that he should recuse himself. In making that application the Respondent's Counsel handed in written submissions together with relevant case-law and copy extracts from various notes of evidence of those accompanying her. The Employment Judge observed that prior notice had not been given to either the Claimant or the ET and there had been no prior attempt to agree a note of the evidence.

21. Pausing there, we observe that was not the best way of making such an application. Notice should have been given to those representing the Claimant, and an attempt made to agree any note of evidence relied on. Prior notice should also have been given to the Employment Judge, not least as that might have enabled the application to have been heard at an earlier stage before the resumed date of hearing.

22. In submissions before us Mr Page, now acting for the Claimant although not representing her below, went further, contending that there was an obligation on Counsel to raise any objections to an Employment Judge's interventions at the time, not after the event. We would not go so far. These things are difficult; much will depend on the circumstances in which the advocate is placed. We certainly would not wish to discourage parties from reflecting as to whether a question of bias or apparent bias really does arise; considering and taking instructions on the issue outside what might be the more heated environment of the Tribunal room. What initially appeared to be an inappropriate intervention on the part of the Employment Judge

might subsequently - after mature reflection - seem to be anything but. We do not criticise Miss Garner, who represented the Respondent both at the ET and before us for not immediately objecting to the Employment Judge's interventions.

23. We return to events at the ET hearing. After giving the Claimant's representative time to consider the application, the Employment Judge declined to recuse himself, considering the complaints raised by the Respondent were in part factually incorrect; in other parts, taken out of context, and in some instances, entirely unjustified. In giving his reasons on recusal, it is relevant to note some of the specific points addressed, at paragraph 93(c)(iv)-(vi) inclusive:

> **"(iv) At the outset of the hearing, I was most concerned at the confusion that was apparent from the papers as to the respondent's reason for the claimant's dismissal. On the afternoon prior to the hearing I had read the tribunal file which included the response form clearly stating that the claimant was dismissed for "*gross misconduct*", on the morning of the hearing I had been provided with the trial bundle and the witness statements and, on reading the suspension letter, the letter of invitation to the disciplinary hearing and the dismissal letter, there was clearly no reference to *misconduct* at all. Consistent with my obligation to attempt to clarify the issues I raised this with Ms Garner at the outset of the hearing; her response was quite unhelpful - to the effect that it did not matter whether the claimant had been dismissed for a reason relating to *conduct* or for a reason relating to *capability* because both of these were potentially fair reasons for dismissal. I did not agree with this proposition because clearly the respondent had to establish a potentially fair reason and implicit within this I would have expected the respondent to be able to state what that reason was. But it was clear that Ms Garner's instructions did not permit her to assist me any further. My questioning of Mrs Sturridge-Packer at the conclusion of the cross-examination was intended to clarify this point and assist my understanding of it. The point had not been fully explored during Mr Ivinson's cross-examination; and it occurred to me that this may have been a deliberate tactic on his part - since, having regard to the burden of proof, there was a possible advantage to the claimant in leaving matters vague. I thought it right and proper to investigate further; my questions of Mrs Sturridge-Packer took rather longer than I would have expected principally because of the evasive answers which she gave. Although I am principally criticised for my questioning of Mrs Sturridge-Packer, I did explore the same issue in some detail with Mr Bagley and with Mr Scott.**
>
> **(v) My questioning of Ms Rawlinson was an effort to clarify another issue. I had by this time heard most of the evidence of Mrs Sturridge-Packer and I was concerned that there appeared to be no understanding on her part that the recommendations made by Ms Rawlinson with regard to the relationship with Jellybeans were not merely as to changes of working practice within the school but would bring about a significant change in the relationship between the School and Jellybeans. This inevitably involved a variation to contractual or quasi-contractual obligations; it appeared to me that implementing Mrs Rawlinson's recommendations could not be done unilaterally - at least not without the risk of damage to the School either in terms of a contractual claim or reputation damage of the risk of losing the nursery which had been regarded as an important asset. I tried many different ways to encourage Ms Rawlinson to address this issue but she either could not, or would not, engage with the point and reverted to telling me why the established relationship was wrong and why it needed to be changed. She would not address the bilateral rather than unilateral nature of the changes that were required.**
>
> **(vi) The occasion [of] which I reminded Mrs Sturridge Packer [sic] of the terms of her Oath have been taken out of context. I was not questioning her understanding of the obligation to the truth (although in the event I find that she was not telling the truth); I was reminding her of the obligation to tell the whole truth. [Relevant] facts are set out in paragraphs 10 - 13**

above; I was seeking an explanation from Mrs Sturridge-Packer as to why the important evidence of her having given a personal instruction to the claimant was emerging for the first time during cross-examination - not having been mentioned during the disciplinary process or in her witness statement."

We return to those specific points at a later stage in this Judgment.

24. On the substantive case, the Employment Judge concluded that the reason for dismissal was not as the Respondent contended. There had been a lack of consistency on the Respondent's case as to what the reason was: the ET3 had put it as gross misconduct; the disciplinary hearing had labelled it "gross incompetence", confirming that there was nothing amounting to misconduct, but then had dismissed the Claimant without notice; the appeal panel had found her guilty of gross misconduct without specifying what that was. The Employment Judge noted (paragraph 66 of his Judgment):

> **"This inconsistency is not merely a question of labels; there is real uncertainty as to whether the respondent genuinely believed that the claimant was unable to do her work to the required standard (incapability) or whether she was unwilling to do so (misconduct)."**

25. He rejected the case of gross misconduct: this had not been investigated as a matter of conduct and the first reference to gross misconduct was at the appeal stage and Mr Scott had embellished his evidence when he stated that he found the Claimant to have acted wilfully. He also rejected the case of capability; of there being a breakdown in trust and confidence. The true reason for the dismissal was some other substantial reason:

> **"In my judgement the true reason for the dismissal in this case is that Mrs Sturridge-Packer regarded the claimant as an obstacle to change in the School; and change was essential. Mrs Sturridge-Packer had concluded that the ways in which the school was administered - both in terms of the accounts and the relationship with Jellybeans was highly unsatisfactory and she had no confidence in the claimant's ability to implement necessary changes. There is no doubt that urgent change was required in this school; that is precisely what Mrs Sturridge-Packer had been appointed to achieve. I accept that, even in the absence of any culpable behaviour, it may be necessary to terminate the employment of an employee who presented an obstacle to such change a dismissal in those circumstances would be for a substantial reason pursuant to Section 98(1) ERA and potentially fair." (paragraph 70)**

26. The Respondent having thus made out a potentially fair reason for the dismissal (although not the one that it had sought to put), the Employment Judge turned to the question of fairness. The dismissing panel did not and could not have had any genuine belief in the Claimant's inability to implement the necessary change; they made no enquiry on this but blindly accepted a bold assertion made by Mrs Sturridge-Packer (see paragraph 72). There were thus no reasonable grounds for the Respondent's belief and no adequate investigation. A fair dismissal would have required:

> **"(a) A considered appraisal and a detailed statement as to what changes were required - the Audit Report and a proper report from Ms Rawlinson would have provided a reasonable starting point.**
>
> **(b) A proper investigation of the claimant's ability and training needs - the haphazard and undocumented visits by Ms Lee did not meet this criteria but a detailed report from her might have been a useful starting point.**
>
> **(c) An action plan properly documented, explained to and hopefully agreed by the claimant as to the changes needed with timescales attached, regular review and a clear understanding as to the possible consequences of failure.**
>
> **(d) The provision of the necessary training to the extent that it was reasonably available - at the very least the claimant might have been given the opportunity to undertake the finance training which Mr Yardley believed she should have had in order to do her duties but which the respondent had never, in fact, provided.**
>
> **(e) Adequate time for the claimant to implement the required changes …" (paragraph 73)**

27. He referred to that approach being similar to that being recommended and required by the Respondent's capability policy, observing that neither Mrs Sturridge-Packer nor Mr Bagley could provide any proper explanation as to why that had not been followed.

28. Failing the carrying out of those steps, the Employment Judge found the dismissal was outside the range of reasonable responses. He went on to make provisional findings under **Polkey** and of contributory fault, subject to possible further submissions by the parties. There was no basis to believe other than that the Claimant's employment would have continued indefinitely (so, no **Polkey** reduction). As there was nothing culpable as regards the Claimant's

conduct, there was similarly no basis for a deduction from the basic award under section 122(2) **ERA 1996** and no basis for reduction of the compensatory award for section 123(6) purposes.

29. Although there was a clear breach of the ACAS Code (paragraph 9), the Employment Judge concluded it would not be just and equitable to apply an uplift in this case.

The Appeal

30. We set out the Grounds of Appeal at the outset of the Judgment. Grounds 1 and 3 can sensibly be taken together: if there was no appearance of bias, the Employment Judge was right not to allow the application to recuse himself. Ground 2, the substitution point, raises different issues (albeit there is some overlap with the apparent bias grounds).

31. Having initially considered this appeal on the papers I directed that the Notice of Appeal and attachments should be sent to the Employment Judge for his comments, allowing also the Claimant the opportunity to provide a response. In his response, the Employment Judge questions the completeness of the material sent to him but he had in fact seen all the witness statements attached to the Notice of Appeal; there were no others. Otherwise, whilst not agreeing with the suggestion made as to his "tone", the Employment Judge generally did not dissent from the Respondent's record of what he had said or how long his interventions had lasted. That was also essentially the Claimant's position for the purposes of this appeal. That being so, I did not direct the Employment Judge to provide his notes from the hearing.

The Relevant Legal Principles.

32. The bias appeal was put on the basis of apparent rather than actual bias. The test is that laid down by the House of Lords in **Porter v Magill** [2002] 2 AC 357: having ascertained the

relevant circumstances, the court should ask itself whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.

33. When faced with an application to recuse itself, guidance has been provided by the Court of Appeal, approving the summary laid down Burton J in the EAT in the same case, in **Ansar v Lloyds TSB Bank plc** [2007] IRLR 211:

> **"1. The test to be applied as stated by Lord Hope in *Porter v Magill* [2002] 2 AC 357, at paragraph 103 and recited by Pill LJ in *Lodwick v London Borough of Southwark* at paragraph 18 in determining bias 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.**
>
> **2. If an objection of bias is then made, it will be the duty of the chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: *Locabail* at paragraph 21.**
>
> **3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: *Re JRL ex parte CJL* [1986] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in *Locabail* at paragraph 22.**
>
> **4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] VSCA 35 recited in *Locabail* at paragraph 24.**
>
> **5. The EAT should test the employment tribunal's decision as to recusal and also consider the proceedings before the tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in *Lodwick*, at paragraph 18.**
>
> **6. 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 something more found a sustainable objection: *Locabail* at paragraph 25.**
>
> **7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in *Lodwick* above, at paragraph 21, recited by Cox J in *Breeze Benton Solicitors (A Partnership) v Weddell* [UKEAT/0873/03] at paragraph 41.**
>
> **8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in *Bennett* at paragraph 19.**
>
> **9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, of the dialogue which frequently takes place between the judge or tribunal and a party or representative. No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in *Peter Simpler & Co Ltd v Cooke* [1986] IRLR 19 EAT at paragraph 17.**

> **10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: *Locabail* at paragraph 25.**
>
> **11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (*Locabail* at paragraph 25) if:**
>
> > **a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or**
> >
> > **b. 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,**
> >
> > **c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge 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,**
> >
> > **d. 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 their ability to try the issue with an objective judicial mind; or,**
> >
> > **e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."**

34. Examples of Employment Judges stepping "over the line" are rare and will be fact and case specific, although the Respondent places reliance on the case of **Peter Simper and Co v Cooke** [1986] IRLR 19. More generally, the danger of judicial descent into the arena troubled the Court of Appeal in the case of **Jones v National Coal Board** [1953] 2 QB 55, in which Lord Denning observed:

> **"… 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.**
>
> **…**
>
> **Excessive judicial interruption inevitably weakens the effectiveness of cross-examination … for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return."**

35. The first step we are required to take is to ascertain what actually took place below. In so doing, we note the observations of the EAT (Lindsay J presiding) in **Facey v Midas Retail**

Security Ltd & Anr [2001] ICR 287, which make clear that we are not bound to simply accept the Employment Judge's version of events and that we should disregard any view they might have expressed as to secondary matters, such as whether they were in fact biased or prejudiced. Equally, however, we bear in mind that an expression of a party's fear that a Judge lacks impartiality will not be decisive; the question is whether this fear can be held objectively justified (see **Hauschildt v Denmark** [1989] 12 EHRR 266 at paragraph 48).

Submissions

The Respondent's Case

36. On behalf of the Respondent it was contended that the Employment Judge erred in failing to apply the **Porter v Magill** test. That said, Miss Garner accepted if we concluded that there was no appearance of bias, this point went nowhere.

37. More substantively, the Respondent made a number of criticisms as to the way in which the Employment Judge recorded his observations of the witnesses' evidence, specifically those relating to Mrs Sturridge-Packer at paragraphs 7-9 of the Reasons: he had gone further than necessary; the observations made were overly personalised and pejorative.

38. Moreover, Miss Garner urged that the fair-minded and informed observer would conclude that the Employment Judge had done more than simply try to clarify ambiguous points in the evidence: he had descended into the arena; he was conducting parts of the Claimant's case notwithstanding the fact that she was represented. In particular, he spent more time questioning Mrs Sturridge-Packer than the Claimant's advocate had done. He had drilled down - in the manner of Counsel conducting cross-examination - on witnesses whose version of

events or thought processes did not fit his theory of the case. It seemed he did not keep notes of what had been said but provided *ex post facto* explanations of his conduct to fend off criticism.

39. As to whether the Employment Judge had substituted his view for that of the reasonable employer on the reason for dismissal; accepting there was some confusion on the Respondent's case, **Abernethy v Mott Hay & Anderson** [1974] IRLR 213 made clear that the reason was the set of facts known to the employer at the time of the dismissal not the label that might be attached to them. The Employment Judge's finding that the reason for dismissal was Mrs Sturridge-Packer's view that the Claimant was an obstacle to change overpersonalised the issues. The Employment Judge was entitled to form a view as to what the real reason for the dismissal was but he had substituted his view for that of the reasonable employer in terms of the steps he required that the Respondent would have needed to have taken to have dismissed fairly (see, in particular, paragraph 73 of the Judgment).

The Claimant's Case

40. On behalf of the Claimant Mr Page first addressed the recusal application, arguing the Respondent had waived the right to object by not making its application when the interventions in issue had taken place. There had also been a lack of proper notice of the application.

41. Turning to the authorities, he submitted that the factual matrix in **Jones v NCB** demonstrated far greater intervention on the part of the Judge in that case and the advocate had made complaint during the interventions, not simply after the event.

42. Descending to the facts of this case, he submitted that the Employment Judge's interventions were justified given the evidence before him. At the outset the Employment

Judge had been unclear as to the nature of the Respondent's case on the reason for dismissal and that was unresolved by the exchange with Counsel at the outset of the hearing. It was proper for him to explore that matter with the witnesses. Further, the Employment Judge had been entitled to clarify Mrs Sturridge-Packer's evidence on the issue of training and whether it would be too extensive or expensive; it was confused and had changed during the course of questioning. By clarifying matters, as the Judge recorded in the last sentence of paragraph 93(c)(iii):

> **"The line of questioning clearly established that Mrs Sturridge-Packer had no basis upon which to tell the Governing Body that the training required was either *too expensive* or *too extensive* …"**

43. The Employment Judge had intervened during the course of Mrs Sturridge-Packer's evidence on the question of the reason for the dismissal. As the Respondent's note records:

> **"The Judge criticises the witness again for not mentioning this particular issue before - i.e whether it's conduct, capability trust breakdown. For example the instance where a school letter is given to an outside party, as happened in this case, J [the Employment Judge] questions whether it's capability or conduct."**

44. That was a proper and necessary intervention given the confusion of the Respondent's case on the reason for dismissal. Allowing that Mrs Sturridge-Packer might not have been the most obvious witness with whom to seek to clarify this issue (she was not actually the decision taker when it came to the dismissal), she had become the main witness and the Employment Judge was therefore entitled to explore matters with her. The case-law recognised that Tribunals were entitled to intervene to clarify points during the evidence of the witnesses.

45. As for the question of the tone of the Employment Judge's intervention, the witness statements relied on by the Respondent simply set out their impressions. The Employment Judge recognised and acknowledged that he had been "deliberately searching" in his questions (see the reference at paragraph 93(c)(ii) of the Reasons), but that had been necessary to address

inconsistencies in the evidence. Had he overstepped the mark in terms of tone then it might reasonably have been expected that the Respondent's Counsel would have objected at the time. Those acting for the Claimant - who had been present at the hearing - did not accept that the tone used by the Employment Judge was inappropriate. It was to be noted that Mrs Sturridge-Packer had been tearful when being cross-examined by the Claimant's Counsel in a way to which no objection had been taken.

46. The Employment Judge was also entitled to set out his observations on the witnesses in his Judgment.

47. On the substitution point the evidence of the real reason for dismissal had been explored in some detail. It was right for the Employment Judge to form his own view as to what that reason was. That was a finding of fact on the evidence, not an error of substitution.

Discussion and Conclusions

48. We start, as we are bound to do, by ascertaining the relevant circumstances. The material before us includes a record of certain exchanges involving the Judge which are not substantively in dispute. There is evidence from those on the Respondent's side as to the Employment Judge's tone, which is variously described as "belligerent" "angry" and "shouting" during some of the exchanges. We have the Employment Judge's decision (and reasons) on the recusal application and also his reasons for the substantive decision he reached on the unfair dismissal claim.

49. There is then the Notice of Appeal and the supporting documentation, including witness statements from some of the witnesses called by the Respondent at the ET. Those include a

statement from Mrs Sturridge-Packer, which raised her concern that the Employment Judge treated her in a way which was racially discriminatory. That, we make clear, is not an allegation which has been pursued in the Grounds of Appeal and we note that the Employment Judge had strenuously denied the points raised under that heading. Whilst accepting the genuineness of Mrs Sturridge-Packer's observations we have to say we do not find that statement particularly helpful in determining the questions before us. First, because it makes allegations which are not the subject of the appeal. Second, because Mrs Sturridge-Packer's more general concerns might have arisen similarly in any case where her evidence as a witness was subject to scrutiny. A witness's feelings and impressions are unlikely to provide the most objective source of evidence for such an appeal. We also considered the statement of Ms Rawlinson, although that did not really go further than the notes of evidence, and the statement of Mr Yardley, on whom the Respondent places particular weight, noting his observation:

> **"Whilst in attendance at the hearing, I found the demeanour and the actions of the judge in his cross examination of witnesses to be more akin to what I would have expected from the claimant's representative (who, during my time at the hearing, was involved in very little cross-examination) … The tone of his [the Employment Judge's] questioning was aggressive and confrontational and witnesses, particularly Mrs Sturridge-Packer and Mr Scott, were interrupted and belittled. Inappropriate, and in some cases, quite simplistic analogies were used, and his general motive seemed to be to want to discredit witnesses and question their professional integrity and not to simply clarify the facts …"**

50. We then have the Employment Judge's response to the Notice of Appeal and supporting documentation (including the witness statements). Ultimately, on the points which we found to be of most significance, there is no dispute as to what took place.

51. We then turn to characterise the fair-minded informed observer for these purposes. She would need to have some understanding of the principles of law involved: this was an unfair dismissal claim; it would be for the Respondent to establish the reason for dismissal, one capable of being a fair for the purposes of section 98 of the **Employment Rights Act 1996**. She would know that, if the Respondent had established such a reason, the burden of proof

would be neutral as between the parties in determining whether the dismissal of the Claimant for that reason was fair. She would seen at the outset of the hearing the exchange with Miss Garner, Counsel for the Respondent, in which the Employment Judge had explored the question of the Respondent's characterisation of the reason for dismissal. She would thus have understood that that was seen as a significant issue in the case and she might have expected to hear more about it in the evidence. Being appropriately informed, she would understand it would be for the Respondent to go first in its evidence and she would have seen the evidence as given by the witness Mrs Sturridge-Packer - not one of the decision takers but the person who had investigated matters, had presented management's case in the disciplinary process and clearly an important person, not just in terms of the management of the school but in terms of the process followed in respect of the Claimant.

52. We can further agree with the Employment Judge that our fair-minded and informed observer can be expected to have seen the witnesses each give evidence; she would not have just parachuted in for the Judge's interventions. She would thus have seen the context of the questions asked; whether there had been confusion or obfuscation on the part of the witness in answering questions and so on. Equally, however, that observer will - as is apparent from the notes of the evidence over the first two days - have seen a significant number of interventions on the part of the Employment Judge. On the first day, in the first hour of cross-examination of Mrs Sturridge-Packer, of some seven pages of notes taken by Counsel, two comprised the Employment Judge's questions. That was a very early stage in the evidence for the Employment Judge to consider it necessary to clarify what was being said. In total, our informed observer would see that Mrs Sturridge-Packer was cross-examined for an hour by the Claimant's legal representative and questioned by the Employment Judge for some one-and-a-half hours.

53. All that might have raised some concern in our observer's mind but still not, of itself, suggest that there was a real danger of bias. She would need to form a view as to the specific examples relied on; as to whether they demonstrated a crossing of the line.

54. During the afternoon of the first day, the observer would have seen the Employment Judge interrupting the questions being asked of Mrs Sturridge-Packer to remind her of her oath. Specifically:

> **"Judge intervention - I take the evidence that you've put in the statement that it is the truth, the whole truth and nothing but the truth. There was no mention at all of you having given instruction to her to buy the safe. The first thing I heard about it is ten minutes ago. Why is there a constant reference to it and was there not a full meeting? Why are we just hearing about it now? (Rhetorical question)"**

55. Advocates in cross-examination will sometimes remind witnesses of the oath they have taken. There may be times when it will be appropriate for a court to do so. The way in which the intervention is recorded here was, however, surprising to us. We consider it might suggest to our impartial observer that the Employment Judge had entered the arena.

56. Returning to the picture unfolding before that observer, on the second day, she will have observed that Mrs Sturridge-Packer brought further documentation to the ET, which was allowed in as evidence notwithstanding an objection for the Claimant. She will have seen Mrs Sturridge-Packer further questioned on those documents and then questioned again by the Employment Judge, with yet more interventions during re-examination. During the evidence of Ms Rawlinson, our observer will have witnessed the following exchange between the witness and the Employment Judge:

> **"Judge: Para 6 of your witness statement - is the suggestion that Mrs Smith was complicit in VAT fraud**
>
> **JR [Ms Rawlinson]: I was stating that orders (for Jellybeans) should not be ordered through the system to avoid VAT**
>
> **Judge: I want a yes or no answer. There is no need to expand."**

57. The Employment Judge explains this intervention as seeking clarification. That may have been the intention but we do not see that pushing for a yes or no answer will generally give the impression of seeking clarification; it is, rather, suggestive of a style of cross-examination.

58. Our observer will then have seen a subsequent exchange with Ms Rawlinson where the Employment Judge effectively repeated a question some four to five times. That exchange seems to us - and, we believe, would seem to the fair-minded, impartial observer - to be characteristic of the kind of drilling down that an advocate might engage in when cross-examining a witness. It is extensive enough that, if so, it might indeed give rise to an objection by those acting for the other side. We consider that the impartial observer would see this as the Employment Judge having formed a view, which he was intent on putting to the witness and pushing for her to agree with. When Ms Rawlinson did not agree, the question was then repeated in different forms.

59. It is also the case that, during the evidence (whether that of Ms Rawlinson, as the Respondent believes, or that of Mr Bagley, as the Employment Judge records; the precise timing makes no difference to the substance of the point), an issue arose as to the Claimant's powers in respect of the cleaning staff. The Employment Judge apparently took issue with the Respondent's assertion as to the Claimant position in this regard. To explore the point further he requested sight of the cleaning contract. It was duly brought to the hearing but took the matter no further. Ultimately it was a bad point: when the Claimant gave evidence she accepted that she had the power in question.

60. We ask whether the informed, fair minded observer would consider that the Employment Judge was thereby stepping into the arena and taking on the role of inquisitor or advocate. As the Employment Judge has observed, it was no part of the Claimant's case that she could not make variations to the cleaning contract. On any case the precise terms of the contract were irrelevant. One is forced to the conclusion that the Employment Judge himself sought disclosure of a document, which neither party had seen as relevant, to make good a point for the Claimant (that the Claimant was not sufficiently senior to make variations to the cleaning contract), which (as the Employment Judge accepts) was no part of her case. It is hard to conclude other than that the fair-minded observer would consider there was a risk that the Employment Judge had a concluded (albeit apparently mistaken) view as to the case before him and had sought out evidence to make it good.

61. The Respondent also took issue with the Employment Judge's refusal to permit it to adduce evidence of practice in other schools (as to where responsibility and accountability lay in relation to financial matters). This, however, was an entirely correct exercise of the Employment Judge's case management discretion; the evidence was not foreshadowed in the statements and he was entitled to conclude it was not relevant: even if other schools had made the Office Manager responsible, it would not assist with what had happened at this school.

62. There were other points raised by the Notice of Appeal which we find to be more border-line. For example, as to whether the Claimant was fully informed of the allegations she was to face at the disciplinary hearing, it seems that, at an early stage in the Respondent's evidence, the Employment Judge interjected:

> **"It [the letter] clearly does not comply with the ACAS Code. You cannot seriously be suggesting that it does."**

The Respondent subsequently made clear that it was relying on more extensive documents in this regard.

63. The Employment Judge's intervention thus seems to have been premature. On this point, however, we can also see that this might have been highlighting a concern on the evidence which the Respondent would then ensure it addressed it in due course. Given the other interventions it might have added to the sense of animus felt by the Respondent, but we would not find the fair-minded, informed observer would conclude it suggested an appearance of bias.

64. As for the question of tone used by the Employment Judge: on his case, "deliberately searching" in his questions; on the Respondent's case, "belligerent", "aggressive" and "shouting". Ultimately we do not reach a concluded view. On this, there is a difference in the recollections and the impressions of the parties, with those acting for the Claimant agreeing with the Employment Judge. Even allowing that the tone was simply "searching", we still find that the informed impartial observer would conclude that the Employment Judge's interventions had crossed the line and gave rise to an appearance of bias.

65. We then return to the comments made about the witnesses in the Employment Judge's Reasons. These are, indeed, strongly expressed. That might not be sufficient to undermine the overall judgment reached. We can see, however, that it corroborates and strengthens the Respondent's case on to the way the Employment Judge intervened during the course of the hearing; that he overstepped the mark. The comments can be seen as going further than was necessary. In particular, in what might be seen as the Employment Judge taking on the role as advocate for the Claimant, we note the observation (in the last sentence of paragraph 9), in relation to Mrs Sturridge-Packer, that she "felt very sorry for herself but had little insight as to

the possible impact on the claimant and her family of having lost her job after 14 years service." We are told this was not a point actually put to Mrs Sturridge-Packer. Whilst the comments are not necessarily belittling of her, we can see that is an overly personalised and pejorative observation, which was simply unnecessary.

66. It is common ground between the parties that, if we conclude that the circumstances in this case were such that there was an appearance of bias, then the entire Judgment is vitiated: we would have no choice but to overturn the conclusion reached and remit this case to a different ET for complete re-hearing. That must be right: such a finding necessarily implies that the right to a fair hearing has been undermined. We also accept that this can impact upon how witnesses give evidence and can thus change the way in which a case comes across. Ultimately, albeit with some reluctance, we have concluded that the line was crossed in this case. The interventions to which we have referred would have caused the independent, fair-minded, informed observer to consider there was a risk of bias: that the Employment Judge had formed a view on the case before hearing all the evidence and was seeking to put that case to the witnesses, pushing for a particular outcome.

67. In so concluding we appreciate that the Employment Judge's conduct may have resulted from a desire to ensure that the Claimant's case was properly put. It may equally be that the Employment Judge was genuinely frustrated with the Respondent's evidence and the way it was putting its case. What happened, however, is that he took on the role of advocate. He may not have done so quite as crassly as the Judge in **Jones v NCB**, but we are unanimous in our view that the interventions here went further than should occur on the part of any Judge.

68. That being our view on the apparent bias ground, we must also conclude that the Employment Judge was wrong not to recuse himself in this case.

69. Given our conclusion on the bias points, we do not have to decide the question of substitution. To the extent that our view might be seen as useful, we would not necessarily be with the Respondent in terms of the reason for the dismissal. It seems to us that that would be for an ET to make a finding as to what the real reason was on the evidence before it and to assess whether that was a statutorily permissible reason. We consider that the substitution points would more properly go to the question of the Employment Judge's assessment of the fairness of the decision and we allow that there may be something in the criticism of paragraph 73 of the Reasons. We do not go further at this stage because it is unnecessary for us to do so and it is better if we do not descend into the details of the merits of the case given that this will need to be considered afresh by a new ET.

70. For those reasons, we allow the appeal.