Appeal No. UKEAT/0157/11/DA
UKEAT/0158/11/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 June 2014
Judgment handed down on 25 September 2014

Before

THE HONOURABLE MR JUSTICE WILKIE

Mr I. EZEKIEL

PROFESSOR K. MOHANTY JP

MS UMA BHARDWAJ APPELLANT

FDA & OTHERS RESPONDENT

Transcript of Proceedings

JUDGMENT

REVIEW APPLICATION

APPEARANCES

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SUMMARY

PRACTICE AND PROCEDURE - Review

Unwise intervention by a Regional Employment Judge in proceedings before the Employment Appeal Tribunal were not such as to give rise to any apparent bias concerning the hearing of claims in an Employment Tribunal, chaired by a different Employment Judge in that Region, which were subsequently the subject of appeal to the Employment Appeal Tribunal.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. This is a troubling and, we trust, a unique case. We are reviewing our decision handed down on 1 November 2012, following a hearing on 27 September 2012, whereby we dismissed an appeal by Ms Bhardwaj in which she raised allegations of apparent bias and a separate ground of appeal of procedural irregularity.

2. We do not propose, in this judgment, to repeat the narrative of the events which formed a substantial part of our earlier judgment.

3. Suffice it to say that Ms Bhardwaj claims against the FDA and other named Respondents that she was racially discriminated against and unjustifiably disciplined by her union and by certain officials of the union. There was a hearing before the Employment Tribunal beginning on 5 March 2010 which resulted in a reserved decision dated 17 September 2010 dismissing her claims and which included findings of bad faith against Ms Bhardwaj.

4. Following the sift procedure of the Employment Appeal Tribunal we considered, at a full hearing, grounds of appeal alleging apparent bias against the Employment Tribunal and procedural irregularity. Other grounds of appeal had been dismissed by the EAT at a rule 3(10) preliminary hearing conducted on 4 October 2011.

5. On 30 May 2013 an application was made on behalf of Ms Bhardwaj for an extension of time to seek a review of our decision. The basis of the application was her wish to have us consider certain further documentation. It comprised: a letter dated 25 March 2011 from the

Regional Secretary of the London Central Employment Tribunal to the Registrar of the EAT; exchanges of emails between London Central Employment Tribunal and the EAT on the 8, 9 and 13 September 2011; and a memorandum written by His Honour Judge McMullen QC on 4 October 2011. That memorandum was written following the decision, on that day, of a panel of the EAT chaired by him, to permit the appeal on the grounds of apparent bias and procedural impropriety to proceed to a full hearing and to dismiss the other grounds of appeal. The memorandum concerned the management of the appeal.

6. It is now apparent that these documents came into the possession of Ms Bhardwaj and her legal representatives on a date in August 2012 as a result of a **Data Protection Act and Freedom of Information Act** request made by them to the Ministry of Justice. That request was passed on to be dealt with by the London Central Employment Tribunal.

7. One of those documents, the letter of 25 March 2011, was included in the documentation provided to the EAT at our hearing on the 27 September 2012. The other two categories of document were not. The Appellant says that the quantity of documentation disclosed to her by London Central was such that she did not notice, in particular, the exchanges of emails upon which she now relies.

8. The letter of 25 March 2011 was written on behalf of Regional Employment Judge Potter of London Central. It says as follows:

> **"The Regional Employment Judge has asked me to write to you having been shown the affidavits lodged on behalf of the appellant in this appeal.**
>
> **She is concerned that the affidavits deal with a range of matters which relate to administrative decisions taken by herself and the President of the Employment Tribunals. These matters are completely outside the knowledge and responsibility of the Tribunal Panel that decided the case. The affidavits are not accurate on a number of points.**

It may be the view of the appeal Judge that the appeal can be decided without reference to these matters. If, however, the view is taken that these matters are material to the appeal then the Regional Employment Judge requests the opportunity to comment on the affidavits."

9. The email exchange began with an email from London Central to the EAT of 8 September 2011 at 11:12. It reads:

"Richard Extall sent a letter to the Registrar dated 25th March 2011 on behalf of the Regional Employment Judge regarding the affidavits lodged by the appellant. She has asked me to enquire whether the letter is on your appeal file, and if so, whether it could be made available for the Judge at the prelim hearing on 4th October 2011."

10. Later in that exchange of emails, London Central wrote further in the following terms:

"Could you please confirm that you have our letter of 25th March 2011 on file."

11. In response, the EAT emailed:

"I may have misunderstood your email. Yes we do have a copy of the ET letter dated 25.3.11 on file however it is Judge _____ comments dated 21.3.11 that we would expect to find in the hearing bundles.

Does that answer the question, if not please do not hesitate to contact me …"

12. The reference to the Judge's comments, dated 21 March 2011, was a reference to a letter written by the Employment Judge, Judge Tayler, in response to a letter sent on behalf of the Registrar of the EAT on 7 March 2011, inviting him to deal with certain matters raised in the grounds of appeal.

13. In response to that last email, London Central emailed at 12:29 on the 13 September 2011 in the following terms:

"Further to the email below and our telephone conversation last week, I have spoken to the REJ about the letter not being disclosed to the parties etc. She has asked that you do nothing with the letter at this stage. However if there is any change I will let you know."

14. The third document, the memorandum of His Honour Judge McMullen QC, dated 4 October 2011 has not, in the event, featured in the arguments before us and so we do not refer to it further.

15. The matters of concern raised in the application for a review in respect of these documents are: that it appeared that REJ Potter was in communication with the EAT about a matter appertaining to a live appeal; that she expected her letter to be placed before the Judge or Judges dealing with the appeal; but that she was requesting that the EAT should not disclose to the parties either the fact or the content of that letter. Furthermore, from the fact that the correspondence only came to the Appellant's attention via a **Data Protection Act** request dealt with by London Central, her representatives were drawing an inference that the EAT had complied with REJ Potter's request not to draw the letter to the attention of the parties. Those concerns were enumerated in five numbered paragraphs in the request for a review, of which four have not featured in the oral argument in support of the review. The fifth, however, has formed a part of the application for a review and reads as follows:

> **"5. The interference by the LCET was information Ms Bhardwaj should have been given and was evidence she would have wished to rely upon as it supported her appeal of bias by the LCET"**

16. By a decision dated the 26 June 2013, the President of the EAT extended time for the Appellant to seek a review and decided that a review hearing should take place before us, the original EAT panel.

17. In the decision to extend time, the President had well in mind that the documents had been in the possession of the Appellant for over a year before her application for a review was made and had been sent to her some four months prior to the EAT hearing and six months prior to the

judgment which she sought to review. The EAT had disclosed them on 29 August 2012. He was unpersuaded that the volume of papers disclosed would have led to a lack of focus on those documents. He concluded, however, that the issues raised were serious and related to the conduct of the Employment Tribunal in respect of the parties before it. In particular it raised the issue that the REJ appeared to assume that she could properly make a comment on an appeal against a tribunal decision within her region which would be taken into account by the appellate decision makers but never revealed to the parties. He concluded:

> **"It is important for the administration of, and for the public confidence in, the impartiality and transparency of our system of justice, that where such serious issues are raised, by responsible lawyers, the system does not seem to lend itself to any appearance of a cover up. I am firmly of the view that in the particular circumstance of this case openness is paramount. It is in the interests of justice to facilitate a review which honours it. That could not be done by ruling that there should not be a review simply because it was sought too late."**

18. The President helpfully identified the nub of the issue the subject of the review in paragraph 9 of his decision in the following terms:

> **" … The ground in the present case is that in Rule 33 (1) (c) that "the interests of justice require such a review". The interests of justice are wider than the merits of a particular case. Here, the allegations are a lack of the necessary transparency in the legal process. Serious allegations are made about the conduct, in particular, of the Employment Tribunal. The central question is whether, if the Tribunal chaired by Mr Justice Wilkie had known of the attempted interference by REJ Potter in the appeal process (if that is what it was) it would have affected the decision of the EAT as to whether there was apparent bias. It might have done so either directly, or by altering the view the EAT took of the context within which the challenge to the Tribunal chaired by EJ Tayler was made."**

The role of REJ Potter

19. At the heart of the Appellant's application for review is the role played by REJ Potter in this litigation. She was not a member of the Employment Tribunal hearing the case. She was, however, the Judge with management responsibility within London Central and as such was directly involved in organising the induction, training and deployment of new and established lay members.

20. Two incidents are said to give rise to the appeal on the grounds of apparent bias. They concerned: first, one of the Respondents, Ms Crighton; and, second, another of the Respondents, Mr Whiteman and one of the lay members of the ET hearing the case, Mr Carter.

21. Ms Crighton, was appointed as a lay member of the Employment Tribunals, allocated to London Central, shortly before the hearing of the claims against her began on 5 March. That fact was drawn to the attention of the parties by Employment Judge Tayler on 23 March and, as the Tribunal concluded (a conclusion which we upheld by our decision), the Appellant did not apply, at that point, for the Tribunal as a whole to recuse themselves and for her claim to be heard in another region. An application, subsequently, for the ET to review its decision relying on this matter was rejected as being out of time.

22. Ms Crighton had initially raised the issue, of her being appointed as a lay member of the tribunals within the same region as the case against her was being heard, with the President of the Employment Tribunals, His Honour Judge David Latham, in a letter dated 16 March 2010. REJ Potter was made aware of this letter by the President and she notified Employment Judge Tayler of that letter so that it could be brought to the attention of the parties on the 23 March 2010. By inference, REJ Potter must also have informed EJ Tayler of a decision made by the President that Ms Crighton would be permitted to continue with her induction and training as a lay member of the Employment Tribunal, but would not be allowed to sit as a lay member until the case had been concluded (see REJ Potter's comments of 13 April 2012 in response to the EAT order of 10 April 2012 and paragraph 12.3 of the ET judgment).

23. The second incident concerned one of the members of the Employment Tribunal, Mr Carter, and his brief interaction with one of the Respondents, Mr Whiteman, at a training event

organised by London South ET on 14 June 2010. Mr Whiteman had been appointed as a lay member of London South ET. Another Respondent, Ms O'Toole, was also a lay member of the Employment Tribunal allocated to the London South region. The case had been transferred from London South to London Central region because of her position. Mr Carter, as a lay member of London Central, attended a training event organised in London South because he was unable, for some reason, to attend the equivalent event organised by London Central. Mr Carter's attendance at the London South event was, according to REJ Potter:

> **"…in accordance with standard practice, my PA made arrangements for him to attend training in another region. The convenient alternative training happened to be in London South on 14th June 2010."**

24. It appears, therefore, that REJ Potter had no direct involvement in re-arranging Mr Carter's training, but was aware of the process by which members might attend training in a different region, if unable to do so in their own.

25. However, when Mr Carter had his brief interaction with Mr Whiteman (and with Ms O'Toole), Mr Carter tried to contact REJ Potter, his Regional Employment Judge, and, having initially failed to do so, eventually spoke to her for advice. After receiving that advice and, we are invited to infer, in accordance with it, he remained at the event, had lunch with all the trainees, joined the next "all assembled" presentation and then went in to group work, in a group not containing Mr Whiteman or Ms O'Toole, before leaving after 16:00 hours. He deliberately kept aloof from Mr Whiteman and Ms O'Toole.

26. On 18 June 2010 Mr Carter reported these events by letter to REJ Potter. Once again, we infer, REJ Potter took steps to inform EJ Tayler of what had been reported to her. EJ Tayler was in receipt of Mr Carter's letter to REJ Potter. On the basis of that and on the basis of a

discussion between him and Mr Carter as to what had taken place he was able to inform the parties on 6 July 2010 of what had happened on 14 June (see EJ Tayler's letter of 21 March 2011, paragraphs 18 and 19). Neither party made any application for the ET to recuse itself on the basis of that event.

27. REJ Potter was a party to a decision on 7 May 2010, (whether taken by herself or in conjunction with the President of the ET) that Ms Crighton should not participate in training within London Central whilst the case was pending (see REJ Potter's comment in response to the 10 April 2012 order, paragraph 7).

28. It appears that the subject matter of the letter from LCET on behalf of REJ Potter, dated 25 March 2011, to the EAT was her concern to be allowed, if thought relevant, to respond to matters raised in affidavits lodged on behalf of the Appellant in this appeal. One of the issues raised in those affidavits (of the Appellant and of Safina Haleema a witness for her and a lay member of the employment tribunal who had also been a party to litigation when appointed), was an apparent difference in treatment between Ms Haleema and Ms Crighton by ET senior management in response to their being parties to litigation in London Central, to which region they had been appointed as lay members. This included reference to an email exchange between Ms Haleema and REJ Potter which included an email dated 4 March 2011 from REJ Potter to Ms Haleema. In that email REJ Potter expressed her views on the propriety of Ms Haleema acting as a witness in support of an appeal to the EAT from a decision taken by a London Central Tribunal, within which region Ms Haleema was a lay member. REJ Potter did, in fact, address these issues in her written response to the order of the EAT of 10 April 2012 (see paragraphs 14-19 and 22-28).

An overview of the EAT decision of 1 November 2012

29. On the contentions of apparent bias, we concluded, in respect of the position of Ms Crighton as a newly appointed London Central lay member, and a Respondent to litigation being conducted in London Central, that:

> **"a fair minded and informed observer … would conclude that there was a real possibility that the Tribunal members would treat such a person differently, even unconsciously, from the way they would treat somebody on the other side making allegations or criticisms. Accordingly … had the appellant asked the Tribunal to recuse itself, it would have been right for it to have done so." (para 45)**

30. However, we also concluded that the Appellant waived her entitlement to ask the Employment Tribunal to recuse itself in circumstances where she could not go back on that waiver (para 46).

31. In respect of the Mr Whiteman incident, we concluded that:

> **"What happened by way of fortuitous brief contact between Mr Whiteman and Mr Carter at the London South training event is not such as to cause a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.**
>
> **It is clear from Mr Carter's own account that direct communication was fortuitous and momentary and, as soon as he became aware of the fact that Mr Whiteman was a respondent in a case before an ET in which he was a member, he took immediate and effective steps to remove himself from any contact with him. Not only that, he took the steps, and persisted in taking steps, to try to obtain guidance from those higher in the hierarchy and he effectively removed himself from possible direct contact by removing himself from the same training group into which they were, fortuitously, placed. In addition he immediately informed his Regional Employment Judge, Judge Potter of what had transpired." (paras 51-52)**

32. We also addressed the involvement of the senior management of the Employment Tribunals, The President and REJ Potter, in the arrangements (differing from time to time) made in respect of training for Ms Crighton and Safina Haleema. We also considered the position of Mr Whiteman as a member of London South, in relation to his training and/or sitting, whilst the case was still continuing.

33. Our conclusion in respect of these aspects was as follows:

> **"83 … The arrangements made within the Employment Tribunals administration as to how it should respond, in the three cases, to the difficulties posed when a newly appointed lay member is also embroiled in litigation in the same region, or in a neighbouring region, is not relevant to the questions we have to consider in relation to this appeal. It is clear that the positions of each of the three, Ms Crighton, Mr Whiteman and Miss Haleema were addressed largely by the President of Employment Tribunals and by their respective Regional Employment Judges and they were dealt with on an individual basis reflecting the degree to which their litigation had, or had not, been completed by relevant dates. Whilst it may be that, for each of them, the approach changed with the passage of time, none of this is, in our judgment, in any way relevant to what happened in this Employment Tribunal on 23rd March 2010 and on the 6th July 2010. On each of those dates the Employment Tribunal, in our judgment, responded to the position as it then knew it to be and fully informed the parties of that situation.**
>
> **…**
>
> **87. In summary, therefore, there is nothing in relation to these issues which in any way affects our judgment that these appeals should be dismissed."**

The context of the letter of 25 March 2011 and emails of 8 – 13 September 2011

34. In the letter of 25 March 2011, REJ Potter expressed concern about the contents of affidavits relied on by the Appellant in support of her appeal and requested an opportunity to comment if the EAT considered that these matters were material to the appeal. One of the matters raised by Ms Haleema in her affidavit was an email exchange between her and REJ Potter on 3 and 4 March 2011. Ms Haleema had indicated that she had been asked to provide a witness statement for the Appellant in respect of the alleged difference of treatment between Ms Haleema and Mr Whiteman and Ms Crighton in respect of their undergoing training as lay members whilst parties to ET litigation. She had signed her affidavit prior to receiving the email from REJ Potter. In particular, in her e-mail dated 4 March 2011, REJ Potter had said:

> **"If you are witness summonsed by the EAT then I absolutely accept that you need to attend and give evidence, however, I do not see it as consistent with your role as a member in London Central to be volunteering evidence in support of an appeal in a case from this region whether in affidavit form or otherwise."**

35. On 10 April 2012, His Honour Judge McMullen QC, in a directions hearing concerning this appeal, ordered that the evidence of the Appellant concerning that email of 4 March 2011 and REJ Potter's email to Ms Crighton of 7 May 2010 (concerning the change in the

arrangements for Ms Crighton's training pending the outcome of the case) be sent to REJ Potter for her comments and for REJ Potter to provide a copy of her email of 4 March 2011 by 12 noon on the 13 April 2012, unless she sought to be represented at an oral hearing.

36. We referred to these matters in our decision at paragraph 65-68 as well as to the relevant part of the document produced by REJ Potter on 13 April in response to that order of the EAT.

37. In that response she dealt with the 4 March 2011 email at paragraph 22-28. In particular, she said as follows in paragraph 25:

> **"… the second paragraph first picked up on Ms Haleema's suggestion that she would be the subject of a witness summons. This paragraph arose from my concern that Ms Haleema had talked to Miss Dasey confidentially about her position and had then set out those conversations in an affidavit. It seemed to me inappropriate for a member to seek to put together evidence on such a matter in this manner, particularly because I believed from the review application and the appeal papers from Miss Bhardwaj that a case was being built with incomplete information, without understanding of a range of managerial issues. I did not and do not see it as appropriate judicial conduct for a member to volunteer evidence of differential treatment by an REJ and the President, quoting confidential discussions with the Chair of the local member's association, to support an appeal in relation to a case in their own region at least without notifying their REJ."**

38. From the judgment of His Honour Judge McMullen QC which gave rise to his order of 10 April 2012, it is clear that, initially, an application had been made to Judge McMullen for an order that the email of 4 March 2011 be disclosed to the Appellant. Judge McMullen had, at that stage, refused on the grounds that it was collateral to the case pursued by Ms Bhardwaj on appeal. Arising out of that, an application was made by Ms Bhardwaj direct to REJ Potter for disclosure of that email, which REJ Potter refused on the ground that disclosure had been refused by the EAT.

39. Following upon those refusals there was the oral hearing before Judge McMullen QC on 10 April. Judge McMullen had twice written to REJ Potter suggesting that it would inform his

decision making if he were to see the email, but she had not provided it. She had indicated that, if an order were to be directed to her, she would wish first to be represented because she would wish to describe the context in which the email was written.

40. His Honour Judge McMullen QC ruled that fairness and transparency in an apparent bias appeal required the disclosure of that email and so ordered. REJ Potter did not seek to make representations and complied with the order.

The new material not previously before the EAT

41. We have already described the contents of the string of emails passing between London Central and the EAT in September 2011.

42. In addition, we have the comments of REJ Potter in another case, **Vatish v The Crown Prosecution Service**, made in response to an EAT order, made on the 10 June 2013. In that document, dated 28 August 2013, REJ Potter says of the letter of 25 March 2011, the following:

> **"My letter of 25 March 2011 was written after discussion with the President of the ET, reflecting a practice agreed in discussions between the ET and EAT, both between the respective Presidents and on attendance of the EAT President at REJ conferences. I understand the agreed approach to be to raise concerns relating to ongoing appeals with the Registrar and to ensure that the correspondence is linked to the appropriate case file for consideration by Judges having conduct of the appeal. I do not understand the arrangement to be that such correspondence would be copied by the REJ to the parties."**

43. This passage came to the attention of the Appellant's solicitors and gave rise to an enquiry by them in a letter to the President of the EAT dated 25 April 2014. They said as follows:

> **" … We have been made aware that the Regional Employment Judge of London Central Employment Tribunal, Miss Potter, has said that there is a practice which has been agreed between the respective Presidents of the Employment Tribunals and the Employment Appeal Tribunals which allows the Employment Tribunal to comment and raise concerns about any ongoing appeals with the Registrar of the Employment Appeal Tribunal without informing the parties involved and ensuring that such correspondence is attached to the relevant case file and considered by the Judges.**

> **We request that details of this practice are provided with a copy of the protocol that Miss Potter says has been agreed between the Employment Appeal Tribunals and Employment Tribunals and their Presidents. …"**

44. This letter was placed before the President of the EAT, Mr Justice Langstaff, who, on 1 May 2014, had the Registrar send a letter containing his response as follows:

> **" …Gunnercooke have raised in a letter their "awareness" that REJ Potter has said that there is a practice agreed between the Presidents of the ETs and the EAT which allows the ET to comment and raise concerns about ongoing appeals with the Registrar, without informing the parties concerned.**
>
> **This is news to me. It is simply not the case. Documents in respect of a case are not private, nor should they be.**
>
> **The letter was also placed before the Registrar who has no knowledge of any such arrangement …"**

The relevant case law

45. The leading case on apparent bias is **Magill v Weeks** [2001] UKHL 67, in particular the speech of Lord Hope of Craighead with whom their other Lordships agreed.

46. Lord Hope reviewed the various formulations of the test developed in different jurisdictions for identifying cases in which a Tribunal should, or should not, recuse itself by reason of apparent bias. In particular, he considered the then current formulation applied in England and Wales which was articulated in **R v Gough** [1993] AC 646, by Lord Goff of Chieveley at page 670. Although Lord Hope and their Lordships approved a modest adjustment of that test in certain respects, they did not question the correctness of the following part of the formulation in Lord Goff's speech:

> **" … The Court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time."**

47. The test which their Lordships decided should now be adopted was first formulated in **Re: Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700 by the Court of Appeal in the judgment of Lord Phillips of Worth Matravers MR (as he then was) at page 716:

> **"85. When the Strasburg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different to the test applied in most of the Commonwealth and in Scotland. The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Tribunal was biased."**

Lord Hope adopted the modest adjustment of the test in **R v Gough** set out in that paragraph. He indicated as follows:

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

The Appellant's submissions on this review.

48. Ms O'Rourke acknowledges that, insofar as she might criticise our conclusions that the Appellant had waived the apparent bias we found to exist in relation to Ms Crighton - being a Respondent in a case being tried in the same region as that to which she had just been appointed as a lay member - then such criticisms are properly to be made on appeal from our decision rather than by way of review.

49. Similarly, she accepts that any criticisms of our conclusion that there was no apparent bias revealed by the circumstances of Mr Carter's brief contact with Mr Whiteman and Ms O'Toole at the London South training day are, similarly, not matters we can properly revisit on review based on the material then before us.

50. Miss O'Rourke, however, invites us, in the light of: - (i) the emails of September 2011; and (ii) the misunderstanding of REJ Potter as to the nature and extent of the access given to

REJ's in proceedings before the EAT, as described by her in August 2013, - to conclude that it puts the involvement of REJ Potter in this litigation in a wholly different light. It is no longer to be regarded in the way in which we characterised it - her administering her region in a manner which was wholly divorced from the conduct of this litigation. Rather, she argues, the fair minded and informed observer, armed with this new information, would conclude that the whole picture of her involvement was such that there would be a real possibility that the ET was biased. This would have the effect of nullifying a waiver by the Appellant made without that knowledge.

51. In particular, she invites us, in ascertaining all the circumstances which have a bearing on this issue, to have regard to REJ Potter's interventions in the EAT processes. She invites us to consider the totality of those interventions including: her words of advice to Ms Haleema about becoming involved as a witness; her letter requesting that the EAT give her the opportunity to make representations in relation to evidence adduced in support of the appeal; her request that the EAT should not pass that letter on to the parties; and her mistaken belief that such intervention, without the knowledge of the parties, was pursuant to an established agreement between the President of the Employment Tribunals and the EAT. Ms O'Rourke invites us to conclude that, - looking at all the circumstances, including that material and the role of REJ Potter, described below, in different aspects of the hearing before the ET, - a fair minded and informed observer would conclude that there was a real possibility that the ET was biased. She does so against the background that we have already concluded that the circumstances, whereby Ms Crighton was a party to litigation in the same region to which she had been appointed as a member, did give rise to apparent bias. It is contended by Ms O'Rourke that the information upon which the Appellant waived her entitlement to ask for the

Tribunal to recuse itself was, as it has turned out, incomplete, in significant respects and, accordingly, is now to be disregarded.

52. The ways in which REJ Potter was involved in the proceedings before the ET, referred to above, were: first, her involvement in communicating to EJ Tayler the disclosure made by Ms Crighton and the arrangements which had then been made in respect of Ms Crighton's training; second, her involvement in the subsequent decision that Ms Crighton should not continue with training pending the outcome of the litigation; third, her involvement in giving Mr Carter advice on his continued attendance at the London South training day; fourth, her passing on Mr Carter's letter of disclosure in respect of these events to EJ Tayler.

53. The events involving REJ Potter which post date the ET decision are said to cast light on the perception of a fair minded observer as to the significance of the involvement of REJ Potter in respect of both Ms Crighton and Mr Whiteman. It is said that, given the full picture, REJ Potter's involvement at that stage may now properly be characterised as more than independent management of her region. It is argued that the view that the fair minded informed observer would take of her total involvement would give rise to such a level of disquiet that we should now be persuaded that such a person, cognisant of all these matters, would conclude that there was a real possibility that the Appellant would not get a fair and unbiased hearing from an ET located in London Central and that the waiver has been superseded by these after occurring and/or after discovered facts.

The Respondent's submissions

54. The Respondent argues that, in the light of our finding that there was apparent bias arising out of the position of Ms Crighton as both a Respondent in and a lay member of London

Central ETs, the newly discovered emails evidencing the interventions of REJ Potter in the EAT process should have no effect on our decision on the issues of apparent bias or its waiver.

55. The Respondent submits that the issue of apparent bias is directed to the decision of the Employment Tribunal. It is contended that the different view we are now invited to take of the conduct of REJ Potter, in the light of her interventions in the EAT process, cannot, in the absence of any evidence of the possibility of her seeking, or having, any possible influence on the ET chaired by Employment Judge Tayler, give rise to this being one of those rare cases where the EAT reviews its own judgment (see **Zinda v Governing Body of Barn Hill Community High** [2011] ICR 174).

56. This is particularly so, the Respondent argues, where there has already been a finding of apparent bias which has, on our view of the matter, been waived in circumstances binding on the Appellant.

57. Accordingly, the Respondent contends that, whatever unease we may feel about: the emails between London Central and the EAT; and the misapprehension of the existence or nature of confidential links between the ET and the EAT upon which the sending of those emails is based, none of this can affect our conclusions on the position as it was before the Employment Tribunal and the circumstances in which the apparent bias in respect of Ms Crighton's position was waived.

Discussion and conclusions

58. In our judgment, it is not appropriate for us to review elements of our original decision which may properly be the subject of an appeal. In particular, our decision, on the material then

before us, on the Appellant's waiver of the apparent bias arising in relation to Ms Crighton's position.

59. Similarly, our conclusion that the fortuitous and momentary contact between Mr Carter (a lay member of the London Central ET hearing the case) and Mr Whiteman and Ms O'Toole (Respondents appointed as lay members to the London South Tribunal) did not give rise to apparent bias on the part of the Tayler ET, cannot be affected by the newly disclosed emails in relation to the conduct of the appeal before the EAT.

60. What remains, however, is the role of REJ Potter in relation to the ET proceedings and the appeal to the EAT, certain elements of which were the subject of argument before us and upon which we adjudicated. Our view was, on the then evidence, that REJ Potter had a role in managing her region and communicating necessary information to Employment Judge Tayler in respect of this case, but that none of that impinged on the hearing of the Appellant's claim by the ET so as to give rise to apparent bias or to invalidate the waiver. The full picture of her involvement in respect of the ET proceedings may be itemised as follows:

(a) In relation to Ms Crighton, REJ Potter contributed to decisions about, and arranged for carrying into effect, deployment, affecting her induction, training and sitting as a member both before and after the waiver. REJ Potter also had to act as a conduit providing EJ Tayler with information, disclosed to her, of circumstances giving rise to possible apparent bias so as to enable the position to be communicated to the parties and decisions to be taken upon those matters.

(b) Our conclusion then was that REJ Potter's role was separate from the ET's hearing of the case and could not affect the propriety of its continuing after the Appellant's waiver of any apparent bias.

(c) In relation to Mr Carter and Mr Whiteman, REJ Potter's role as manager of the region was to receive information from Mr Carter about the contact between him and two of the Respondents at the London South training event. She, in that role, gave advice which, it appears, Mr Carter followed. On that basis we concluded that no situation arose in which that inadvertent contact gave rise to any apparent bias.

(d) REJ Potter received Mr Carter's disclosure letter in respect of those events and passed it on to EJ Tayler for consideration and action by him and his tribunal.

61. What is now said on behalf of the Appellant is that, in all the circumstances of the case, as now revealed, in respect of REJ Potter's involvement in the ET and the EAT proceedings, a fair minded, informed observer, having considered all those facts, would conclude that there was a real possibility that the Tayler Tribunal was biased and that the waiver is invalidated by these after discovered matters..

62. This argument proceeds on the following basis:

(1) REJ Potter was critical of Miss Haleema becoming a witness in support of this appeal from a decision of a London Central Tribunal.

(2) REJ Potter was reluctant to provide HHJ McMullen QC with a copy of her email of 4 March 2011 to Miss Haleema.

(3) REJ Potter took the initiative in requesting the opportunity to comment to the EAT about evidence lodged in support of this appeal.

(4) REJ Potter sought to persuade (and it appears persuaded office staff at) the EAT to place her communications about the appeal before HHJ McMullen QC without disclosing them to the parties.

(5) REJ Potter acted in this way based upon her misapprehension of the existence of an agreement between the Presidents of the ET and the EAT permitting her to intervene without the parties to the litigation being informed.

63. Those matters, considered cumulatively, should, it is said, cast a different light on the conduct of REJ Potter in relation to the ET hearing both in relation to Ms Crighton and the training day incident. It is said that such consideration of the totality of REJ Potter's involvement in the ET and the EAT proceedings should cause us to revisit our conclusion that REJ Potter was merely carrying out managerial functions in relation to her region, which were separate from the hearing by the ET of an individual claim. Rather, it is said that, armed with this further information, the fair minded and informed observer would conclude that there is a real possibility that the totality of REJ Potter's involvement in the hearing of this case at the ET and the EAT was such that there was a real possibility that the ET was biased by reason of the personal involvement in aspects of the litigation by REJ Potter. This would mean that there was apparent bias both in respect of the positions of Ms Crighton and Mr Whiteman and that the waiver, in respect of the Ms Crighton position, made in ignorance of these matters, is invalidated.

64. Thus, it is argued that the decision of the Appellant to waive the apparent bias, arising simply from the fact that Ms Crighton was both a Respondent and a member of the Tribunals in that region, is rendered ineffective because of the additional dimension now revealed, namely, the real possibility that REJ Potter had been, or became, personally involved in the litigation.

65. We are concerned about the behaviour of REJ Potter in respect of the appeal to the EAT.

66. In our judgment, it was unwise of her to become embroiled with this appeal to the extent of giving pointed advice to Ms Haleema about her volunteering to give evidence in support of an appeal from London Central whilst being a lay member of Tribunals in that region.

67. We have concluded that a fair minded, informed, observer might well conclude that there was some personal sensitivity on the part of REJ Potter about evidence being put forward in this appeal suggesting, and being critical of what was said to be, inconsistency of practice on her part in relation to arrangements enabling, or not enabling, lay members, who were also parties to litigation conducted in the region, to continue with their induction and training.

68. We are satisfied that a fair minded and informed observer would conclude that there was a real possibility that, from that point on, REJ Potter's role moved from being an indifferent administrator of the system in her region to being a person with a personal stake in the litigation.

69. It is against that background that, we perceive, REJ Potter was moved to take the initiative with the EAT in demanding to be allowed to comment on matters raised in such evidence. It may have been better for her to have awaited a decision of the EAT that the issues thus raised were sufficiently germane to the appeal so as to request any response she might wish to give.

70. REJ Potter, having taken the initiative in that way, then was placed in the position of asking the EAT, in the September emails, not to disclose her putative intervention to the parties, in the event that the EAT decided the issue was not germane to the appeal.

71. In our judgment that too was a mistake. It was apparently based on a misapprehension about there being a facility for REJs to communicate with the EAT in that way.

72. It is clear that no such facility exists to enable REJs to comment on the substance of matters from their region which are the subject of an appeal to the EAT from their region. It does not surprise us to learn that no such arrangement exists and we agree with Mr Justice Langstaff's forthright rejection of the possibility.

73. Each of those matters of concern, which might well cause the fair minded and informed observer to conclude that REJ Potter had become overly involved in the litigation in a partisan way, relate to the proceedings before the EAT. In our judgment, however, the fair minded and informed observer would not consider that there was a real possibility that these developments, at the appeal stage, would have infected the propriety of the process before the ET so as to give arise to a real possibility, on that additional basis, that the ET was biased. In particular, in our judgment, it would not have added materially to the perception of apparent bias at the ET stage arising out of the position of Ms Crighton so as to impact on, or invalidate, the waiver; nor does it affect our conclusion that there would not have been any perception of apparent bias in relation to the training day incident.

74. It therefore follows that, in our judgment, there is no basis for us to review our decisions: that there was apparent bias in relation to the Crighton position, but that it was waived in circumstances which are binding on the Appellant; and that there was no apparent bias arising out of the training day incident.

75. Accordingly, we refuse this application for a review.