Appeal No. UKEAT/0496/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 9 May 2014
Judgment handed down on 17 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

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(1) MR V BEGRAJ
(2) MRS A BEGRAJ APPELLANTS

HEER MANAK SOLICITORS AND OTHERS RESPONDENT

JUDGMENT

APPEARANCES

For the Appellants	MR DECLAN O'DEMPSEY (of Counsel) Instructed by: Shoosmiths LLP Apex Plaza Forbury Rd Reading Berkshire RG1 1SH
For the Respondents	MR JAMES LADDIE QC (of Counsel) Instructed by: Messrs Heer Manak Solicitors 434 Foleshill Rd Coventry CV6 5JX

SUMMARY

BIAS, MISCONDUCT AND PROCEDURAL IRREGULARITY

An Employment Judge was approached by Police Officers part way through a lengthy hearing. They gave her information prejudicial principally to one party, and asked her to keep their approach from the parties. She did so for a week, before revealing what had happened (to both the lay members who constituted the hearing panel, and the parties), but did not answer further questions from the Respondents. After taking time to consider their position, the Respondents applied to the Tribunal to recuse itself, which it did.

The appeal was brought by the Claimants, arguing that there was no proper basis for the recusal; that in any event the Respondents had waived their right to seek it by delay before applying. A Judge should be expected by the fair minded impartial observer to keep irrelevant matters out of mind when reaching a decision ("compartmentalise" that information); and the right of the Claimants to access to justice would be denied if there were to be recusal at such a late stage in the hearing, given the time and costs already incurred, such that it would be difficult to afford professional representation before a fresh tribunal.

Held: Waiver had not been argued below, and should have been, but in any event that ground was misplaced. There had been no act inconsistent with seeking recusal, and the Respondents lacked full information. The cost and inconvenience of a rehearing was relevant to justice, but of central importance was having a fair trial before a Tribunal that both was and appeared to be impartial, for as said in **AWG Group Ltd v Morrison** nothing less would do. The Tribunal's decision was right: what in particular mattered here, so far as the "compartmentalisation" ground was concerned, was not the possession of untested information prejudicial to one party, but the conduct of the Judge in keeping it, and the circumstances in which it was given to her, from the parties for a week. Appeal dismissed: though the facts of this case were extraordinary, guidance was given as to the approach Tribunals should take if approached by a third party about the merits of a case.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. A case proceeding at Birmingham Employment Tribunal (Employment Judge Cocks, Mr Bradley, Mr Jones) took an exceptional and highly regrettable turn after nearly 30 days of evidence. A third party gave information to the Judge in private, both orally and in writing, in what (unless any other convincing explanation is given in an enquiry being conducted by the Independent Police Complaints Commission) may well have been a deliberate attempt to prejudice her against one party to the on-going litigation. The third party then asked the Judge, in the presence of the acting Regional Employment Judge (REJ), not to reveal anything of this private communication to the parties. She apparently neither rejected nor queried this request but instead acceded to it, and kept the matters secret from the parties for a week. There is no information as to whether the acting REJ acquiesced in this, though it might be inferred that he did.

2. When subsequently an application was made by the Respondent for the Employment Tribunal to recuse itself, it did, on the grounds that a fair-minded and informed observer would think that in these circumstances there was a real possibility of bias.

3. Although it is highly unusual for a decision for an Employment Tribunal to recuse itself to be challenged on appeal, especially when there was no material dispute below as to the applicable law, this appeal makes just such a challenge. It was rejected on the sift by HHJ McMullen, but permitted through to a full hearing on an application under Rule 3 (10) of the Employment Appeal Tribunal Rules 1993 by HHJ Peter Clark. He did so not only on the basis that the points raised might be arguable, but also that as President of the EAT I might give guidance to Tribunals and parties as to the way in which such matters might be handled appropriately in future.

The Facts

4. The first Claimant was formerly a business manager at the Respondent firm of solicitors, by whom his wife the second Claimant was employed. The trial of his several claims involved allegations and counter allegations of serious misbehaviour. Public interest disclosure was said to be involved. One of the Respondents was facing trial at Birmingham Crown Court for mortgage fraud.

5. On 18th October 2011, the Employment Judge was told in an email from the Claimants' solicitors that the windows of a witness who had given evidence on their behalf had been put through.

6. The next day, 19th October, two police officers came to the Employment Tribunal before it was due to sit, and asked to speak to EJ Cocks. They met her, in the presence of the acting REJ, Mr Kearsley, and in his retiring room and spoke there for some 5-10 minutes. In the course of this, they handed EJ Cocks a sheet of paper on which was typed information about the Respondents, giving details of "intelligence" received by the police and containing information on investigations into alleged criminal conduct. There was also some information about the First Appellant.

7. The meeting was not recorded, though a note of some of what was said was made after it. The parties do not know what else might have been said beyond that which was later revealed. No details of the extent if any of that has been given.

8. In line with the request addressed to her (and, it would appear, with the acquiescence of the acting REJ) the Judge said nothing to the parties. The best understanding of Counsel before

me on the appeal, who were present at the application to recuse the Tribunal, is that she did not tell the Lay Members either.

9. The case continued for a further 5 days. Then, on 24th October, the first Claimant when giving evidence volunteered, by unnecessary elaboration of and expansion upon what would otherwise have been a relevant answer, that the first Respondent was routinely involved in criminal activity, and that this was being investigated by the police. He named two officers – DS Bates and FI Holder - whom the Judge understood to be the officers who had spoken to her and, though the full extent of what he claimed was disputed, suggested that he had been keeping them up to date with developments at the Tribunal by regular contact.

10. Whether or not it was because this raised a suspicion that there was a link between this answer and the earlier visit which made EJ Cocks review her silence, or whether it was for some other reason, on the next sitting day (26th October 2012) she asked to see the legal representatives in private. This was a departure from the rule that hearings before the Employment Tribunal should take place in public.

11. She told them what had occurred a week before. She provided copies of the document which had been handed to her by the Police Officers. Some of the information in the document had not been in evidence before the Tribunal.

12. The parties agreed they should take time to consider what, if anything, should be done. On 30th October the Respondent asked questions of the Judge about what had happened. She said she would not answer any questions. On the next day the acting REJ wrote to inform the Respondents that he had advised her not to enter into any correspondence, and that any application should be made on notice.

13. On 7th November the Employment Tribunal hearing was adjourned until 4th February 2013. Counsel for the Respondents expressly stated that the Respondents were reserving their position as to whether or not there would be an application for the Tribunal to recuse itself in the light of what had happened.

14. On 27th November, the Claimants' solicitors asked the Respondents to make any such application in good time so that it could be dealt with prior to any continuation of the hearing.

15. The Respondents had in the meantime complained to the Professional Standards Department of West Midlands Police, who responded on 25th January 2013 indicating that they would suspend the investigation because of the sub-judice rule in respect of both of the Tribunal proceedings, and the trial of the Respondent Mr Chahal which was then current (I have been told by Mr Laddie QC that it was subsequently discontinued). Forthwith, the Respondents applied for recusal.

The Tribunal Decision to Recuse Itself

16. The Tribunal referred centrally to Article 6 of the European Convention on Human Rights, scheduled to the **Human Rights Act 1998,** and applied the test as stated by Lord Hope in **Porter v Magill** [2002] 2 AC 357 HL at Paragraph 103:

> **"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."**

It paid particular attention to **Hamilton v GMB (Northern Region)** [2007] ILR 391, especially paragraph 29 which it set out in full. In the light of those authorities, and **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] IRLR 96 CA, the Tribunal carefully picked its way through the submissions which had been made to it. Mr O'Dempsey, for the Claimants, argued that a Judge

was capable of putting matters of which he had been informed to one side when reaching a judgment (something which had been termed "judicial compartmentalisation" in a decided case, an expression which he adopted). The Tribunal commented that whether the Tribunal could do so was not the correct test, as this would conflate two different concepts – that of compartmentalisation, and that of the perception of the fair-minded informed observer. It preferred to follow the guidance given in **Hamilton**. Though it accepted many if not most of Mr O'Dempsey's points in answer to the submissions made in favour of recusal by Mr Laddie QC (who by now was appearing for the Respondent, and who along with Mr O'Dempsey appeared before the EAT), it sought as best it could to take the place of the fair-minded observer: it "looked at the situation in the round rather than just taking each point or submission and considering it in isolation". It then said this, in four central paragraphs:

> **"19. If we discount the speculative nature of some of Mr Laddie's submissions as to motives and reasons, the situation is this. It has been patently obvious, and frequently expressed by the Representatives, that this case is one where the credibility of the parties and the witnesses is very much in issue. Both sides have, on occasions, been permitted to give evidence and be questioned in cross-examination on matters not directly relevant to the issues for that very reason. As much as the Tribunal has tried to control the extent of matters going to credibility only and bring the parties back to the issues, this is a case where there is so much factual dispute amongst the parties that assessing credibility will be crucial to our determination of the issues.**
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> **20. Despite Mr O'Dempsey submitting that the document disclosed contains matters which the Tribunal already knew about, for the most part, it is the way in which information is provided which leads us to agree with Mr Laddie that it is to be viewed as more prejudicial to the Respondents than the First Claimant. But it is not just the document in question. It is the circumstances surrounding the document and the visit by the police. Irrespective of motives or reason, the visit happened, information was given to the Judge in the absence of the parties and there was a delay in informing the parties of that…**
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> **……**
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> **22. …The test is not that a fair-minded and informed observer would conclude that we were biased but simply that there was a real possibility that we were. Even if we strip out what Mr O'Dempsey calls the speculative and fanciful, the Tribunal concludes that such an observer could conclude that there was a real possibility of bias…**
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> **……..**
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> **25. The Tribunal is very much aware of the consequences of this decision for all the parties. We take on board what Hamilton states about there being a**

potential inconsistency between the consequences not being a material factor and Locabail. The position of the EAT in Hamilton is that it considers this would only be where the case is a marginal one. We considered this. The Tribunal cannot say that this is a marginal case when viewed objectively."

The approach on appeal

17. The parties were aware of one case only (**West lb AG London Branch v P Pan**) in which an Appellate Court had overturned a decision by a Tribunal to recuse itself. Given the view expressed in **Locabail**, at paragraph 25 [2000] QB 451 at 480G-H "…if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal" this is unsurprising.

18. Mr O'Dempsey nonetheless argues that an Appellate Court is in as good a position as the original Court to assume the vantage point of the fair-minded and informed observer, and so must itself make the necessary assessment (per Mummery LJ, with whose judgment Latham and Carnwarth LJJ agreed, in **AWG Group Ltd v Morrison** [2006] 1WLR 1163, EWCA Civ 6, and per Scott Baker LJ in **Flaherty v National Greyhound Racing Club Ltd** [2005] EWCA Civ 1117, at paragraph 27, as noted in **Hamilton** at paragraph 29(3)). Accordingly, he submits, it is open to the Appeal Tribunal to make its own assessment.

19. The first and logically preliminary issue is thus the approach the Appeal Tribunal should take. Mr Laddie QC's answer to the submission is that the jurisdiction of the Appeal Tribunal is statutory. It lies only on a point of law (see **Employment Tribunals Act 1996**, s.21). Making a different assessment is not the same as demonstrating an error of law. He distinguishes between those cases in which on the one hand a Tribunal refused to recuse itself, where the principles are well established, as in **AWG**, **Flaherty** and **Hamilton**, and those on the other hand where the Tribunal had recused itself having exercised its discretion to do so. He argues that in such a case the decision is no different from any in which a Tribunal makes an assessment of mixed fact and law, applying appropriate authorities to do so. The assessment

would have to be shown to be outwith that which a reasonable Tribunal could make, or that it had in reaching it taken into account something which it should not have done or left out that which it was necessary to consider. Mr O'Dempsey retorts that there is no essential difference in principle between the two situations.

20. The authorities are clear that an Appeal Court is generally in as good a position as a Tribunal to assess what the fair-minded and informed observer would think. I do not see any reason why this principle should apply differentially depending on whether that Tribunal decided to refuse an application to it to recuse itself, or to accede to it. There is however a difference in the information which the observer would have. He would know in the latter case that the Tribunal itself took the view that there might be a risk of bias. Though this is not determinative of the case, it is evidence of it, since (as Mr Laddie QC argued) it takes account of the nuances which will be well appreciated by the members of the Tribunal, but which might be missed by a Court attempting to recreate the scene for itself in order to fill the shoes of the observer. It also conveys the Tribunal's own concern that it may not fully be able to keep the matters out of the minds of its members. Finally, but importantly, where the parties are told by a Tribunal that it accepts it may not be able to appear to give the case the icy impartiality which is a prerequisite of justice, for them then to be told that despite that Tribunal's own view of its limitations they should nonetheless face a hearing before it is to risk public disrespect for the system that requires this. Accordingly, though much will depend upon the particular circumstances of the case, the fact that a Tribunal thinks it proper to recuse itself deserves some weight in assessing what would be the view of the fair minded and informed observer.

Waiver

21. A second issue which is also logically a preliminary one though fourth of four grounds of appeal in the Notice of Appeal, is Mr O'Dempsey's argument that the Respondent waived their

right to invite recusal. He relied on the principles expressed in **JSC BTA Bank v Ablyazov (No 9)** (CA) [2012] EWCA Civ 1551; [2013] 1 WLR 1845, in which a late objection was made to a Judge hearing the trial of an action in which he had made some two dozen interlocutory judgments, all cautiously and judicially. The objection was on the basis that some four months earlier the Judge had said that he would wish to be cautious about accepting Ablyazov's description of black as black. It was argued that, after that, Ablyazov could not expect an impartial trial. As to that the Court observed (per Rix LJ at para. 74) :

> "**In my judgment, the fair-minded and informed observer would not consider that there was any real possibility of bias in this case on the part of the judge. He or she would rather conclude that this late objection to the judge hearing the trial, made some eight months after the judge's judgments in the committal proceedings, was made not so much from a fear of bias but in a desire to put off the trial at, so to speak, close to expiry of the twelfth hour. As Lord Bingham of Cornhill CJ said in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 2.5: "The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." And as he also said, at para 2.6: "It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should."**
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> **75 Those considerations, as well as the more general matters referred to at para 65 above, have to be borne in mind as well as the precautionary principle that it is better to be safe than sorry**."

22. This led to a discussion of the principles of waiver, which it was accepted on the earlier authority of **Locabail** were applicable without special difficulty to a case of alleged apparent bias. If, appropriate disclosure having been made by the Judge, a party raised no objection to the Judge hearing or continuing to hear a case, that party could no longer complain of the matter disclosed as giving rise to a real danger of bias. Silence in the face of disclosure could therefore amount to waiver.

23. Here, argued Mr O'Dempsey, the Respondents had done nothing after knowing of the circumstances revealed by the Judge on 26th. October, beyond asking the questions they did on 30th. October, until they did so in January 2013. Their silence amounted to waiver.

24. He accepted, however, that waiver had not been argued before the Employment Tribunal when it was asked to recuse itself. This on its own would be sufficient for me to have to reject this appeal, for a Tribunal can hardly be held to be in error for failing to rule on a procedural bar which has to be argued before it to be effective (see **Glennie v Independent Magazines (UK) Ltd** [1999] EWCA Civ 1611) and it was not, nor could it be said that it was one of those exceptional cases to the **Glennie** principle which that decision, and the later encapsulation of principle in **Secretary of State v Rance** [2007] I.R.L.R. 665, recognised.

25. Even if it had been open to argument, the plea of waiver could not have succeeded. For it to be effective, there first has to be disclosure of the full facts. Here, it is said there are not: and this is not mere assertion, for the Respondents can point to the fact that they asked questions of the Employment Judge on 30th. October which were rejected not as being irrelevant, but instead on the otherwise unexplained basis that the acting REJ advised her not to answer. There has been nothing to explain why the Employment Judge did not reveal matters fully at the first opportunity immediately after the approach by the Police; nor why she did not volunteer an answer to the obvious questions which arose – (a) to establish why she saw the Police in the company of the acting REJ, which might indicate she knew there was something of significance about to be said to which a witness was needed; (b) whether she asked the Police why they wished to see her, and (c) how, precisely, they responded; (d) when she told the lay members of what had happened and what their reaction was, if in fact they learned earlier than the 26th.; (e) why she did not say anything to them before the 26th., if she did not; (f) what her response was to the receipt of information given her by the Police, and why; (g) what it was that made her change her mind about keeping quiet; (h) whether she saw any link between the Claimant's volunteering a prejudicial answer, relating to Police investigations, and the visit by the officers to the Judge of which he may have known but the Respondents did not; and (i) what else was

said during the conversation which has not yet been revealed. None of this appears to have been volunteered. I accept, therefore, that waiver could not be said to be fully informed.

26. Further, the ground for holding there to have been waiver – the passage of time, without anything else being done during that period to indicate that the Respondents wished to continue the case before the same Tribunal – is insufficient a basis on the particular facts of this case. The Respondents had reserved their position. It was that reservation which led to the Claimant asking if it had yet decided to apply, and urging a quick decision. In a case such as this, where considerable evidence had been heard, and expense incurred, all of which would be rendered nugatory if the trial had to be aborted, a decision whether to apply was unlikely to be immediate. It obviously needed careful thought.

27. It is unsurprising that the application for recusal should have been made as soon as it seemed that there would be no effective Police investigation into the conduct of the officers nor any official explanation of their purpose in approaching the Judge: this might possibly have supplied some of the answers to the obvious questions which the Employment Judge had declined to provide. It was on 25th. January that the Police indicated their investigation would currently go no further. The application was made within a week of that. Just over two months had passed after the letter from the Claimants seeking a quick decision. In the circumstances, this is not a lengthy period.

28. It has not been suggested to me that the passage of that period of time led the Claimants into taking steps they would not have done had they known that the application would be made: indeed, they would be bound to expect that it might be, since that was the very reason they asked the Respondents to be quick.

29. In short, on its facts, waiver was an unpromising ground of appeal at the outset, and fares no better after argument.

Grounds of Appeal

30. The Claimants took three substantive points. They argued first that the Tribunal erred in law, because it failed to attribute to the informed observer the knowledge that Tribunals were capable of "compartmentalisation" – the exclusion of irrelevant information from their minds, no matter how prejudicial that information might appear to one or other of the parties before them. Moreover, Mr O'Dempsey argued that the prejudice could be remedied by the Police Officers being called before the Tribunal to face cross-examination, so that what they said might be properly evaluated, and their behaviour explored openly and assessed objectively. Secondly, to grant recusal failed to take proper account of the right to a fair hearing guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms. This was because the costs of re-litigating the case, traversing again the 30 days of evidence and bringing it to a conclusion, was beyond the means of the Claimants. That denied them effective access to justice. The Tribunal, which had been informed of the limited means of the Claimants, did not take account of these consequences. It thereby, and thirdly, prevented the Claimants having a real and effective remedy for the discrimination against them, despite the requirement in discrimination law for this to be ensured.

31. As to the first ground before the Tribunal Mr O'Dempsey relied upon the case of **R v May** [2005] 1WLR 2902, a decision of the Court of Appeal, Criminal Division. The central issue in the case was the extent of the benefit of a conspiracy, of which the Appellant was guilty, which was to be established or assumed for the purposes of granting a confiscation order against his assets. During the course of the Criminal trial leading to conviction, the Judge had heard public interest immunity hearings. At those, he might have been provided with evidence

relevant to the confiscation proceedings. Whereas during the trial the issues of fact were for a jury, the issues in the confiscation proceedings were for the Judge alone. Accordingly, it was argued that his possession of knowledge which was not revealed to the parties meant that he could not and should not properly sit to hear them. The Appellant argued that however much the Judge may have tried to have put the matter out of his mind it may nonetheless have influenced him, and because information put before him on a PII Hearing was unknown to the Appellant, could not properly be dealt with. The Judge, however, said that he would ignore anything revealed to him which attracted public interest immunity. The Court of Appeal accepted that judicial compartmentalisation, by which it meant the ability of a Judge to put irrelevant matters of which he had been informed out of mind when making a decision, was possible, and there was no proper basis for recusal.

32. I note, in passing, that in the judgment of Keene LJ at 2911 A-C he noted that if the trial Judge formed the view that, despite his best efforts, he would be unlikely to be able to ignore undisclosed material which he had seen which was to the detriment of the Defendant before him, consideration might have to be given to his appointing a special advocate, for the purpose of receiving that information on behalf of the Claimant, but without disclosing it to him, so that as far as possible any answers to it could be given to the Court.

33. The Tribunal here (at paragraph 21) thought it to be a crucial difference between the facts of the present case and those of **May** that the information prejudicial to the Respondents should never have been passed to the Employment Judge in the first place, whereas there was a recognised system for doing so in criminal cases. At paragraph 14, the Tribunal also commented on what it saw as the conflation of judicial compartmentalisation on the one hand and the perception of the fair minded and informed observer on the other. Mr O'Dempsey argued that these were not separate considerations. The fair minded observer is an informed

one. An informed observer would be aware of the system and how it operates. He referred to **R (Barclay) v Lord Chancellor (2)** [2014] 1WLR415, para. 65. The appointment of the Seneschal of Sark as both the Chief Judge on the island, and President of the legislature, the Chief Pleas, had earlier been held to compromise judicial independence from executive interference, so as to fall foul of Article 6 of the European Convention on Human Rights (ECHR). The case concerned a proposed law, by which a committee would recommend the appointment of the Seneschal – since this was subject to the approval of the Lieutenant Governor of Guernsey, who was independent of the legislature and executive in Sark, this was held compliant with article 6 - but which left open the possibility that the Chief Pleas could arbitrarily alter the remuneration of the Seneschal, which was thought incompatible with judicial independence, and therefore incompatible with Article 6 ECHR. In that context the Divisional Court asked whether this might cause it to appear to an objective observer of proceedings before the Seneschal that there was an appearance of lack of independence or impartiality. It was said at paragraph 65 that it was

> **"…necessary to take into account "the way the system is in fact operated": see Kearney v HM Advocate (2006) SC (PC) 1, paras 8 and 46 and Clarke v United Kingdom (Application No 23695/02) (unreported) given 25 August 2005, pp12-13"**

34. Mr O'Dempsey argued that the ability of a Judge to put some facts out of mind when reaching a decision was a well-known part of the system. An informed observer would know of it. Thus it was neither independent of nor antagonistic to the concept of the fair minded observer, but was that of which such an observer should take note. An Employment Tribunal may frequently receive material from parties and others relating to a case which has not been copied to those other parties: it will normally ensure that that material is then copied. The informed observer would know of this and would not accuse the Tribunal of bias because in the interim period between receipt, and copying to others, it was party to information from one party of which the other party did not then know. There were sufficient guarantees in respect of

the Tribunal here, he suggested, because of the nature of the judicial oath by which the Tribunal was bound; the punctiliously correct conduct of that Tribunal throughout the case; and the opportunity of cross-examining the Officers which could have been afforded. The Tribunal had simply failed to consider, as required by **Locabail** at paragraph 25, whether

> **"..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 before him."**

There were three members of the Tribunal. Only one had had a private meeting with Police. The other two were in the majority, and guaranteed the independence of the Tribunal: see **Micallef v Malta** (2010) 50 E.H.R. 37 (paragraph 93), in which reference was made by the European Court of Human Rights in its judgment accepting that an objective test to determine possible bias involved

> **"..ascertaining whether the Tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality."**

35. In respect of the second ground, Mr O'Dempsey relied again upon the possibility of cross-examination, arguing that a decision should be made which was proportionate. Article 6 required a balance to be struck between the competing rights of the parties in relation to recusal. Article 6 guaranteed the right of access to a Court. This had to be real and effective. Whilst that right might be subject to limitations, they must not be such as so to restrict or reduce access to the Court that the very essence of the right was impaired. For this he relied on **Stanev v Bulgaria** (2012) 55 EHRR 22, at paragraphs 229-231. The hearing here was long, complex, and full of technicality. Representation was essential if justice was properly to be done. The ET knew or ought to have known that it would be practically impossible for the Appellants to start these proceedings again without representation. They would not be able to begin on equal

footing with the Respondents. They could not afford to. The effect of a recusal decision should have been taken into account.

Conclusions

36. I shall deal with each of these points in turn. First, however, some general observations need to be made. The first argument – "compartmentalisation" – when reduced to its essentials is an argument that the Tribunal in assessing all the circumstances did not pay particular regard to one of them. Whereas I accept that in many cases a Judge will be able to put out of his mind certain matters which he has heard, and disregard them as irrelevant, nonetheless his ability to do so is only one of many circumstances, to all of which a Court must have regard in assessing what the informed observer would make of the situation. It would be a great pity if the theoretical observer were obliged to give greater weight to some particular features, less to others, and so on, on a sliding scale prescribed by judicial decision, for this would be to take too particular and inflexible an approach to a concept one of the great virtues of which is its adaptability to many different circumstances. Essentially, the question is whether the hypothetical observer would see in the facts a real risk to fairness. Reference to such an observer is in reality the reference to an objective standpoint, as opposed to the definition of the character of, or the particularity of knowledge of, a given human being. It is important in taking such an objective standpoint in order to determine whether there is a risk to fairness to avoid too mechanistic and prescriptive an approach.

37. Insofar as Mr O'Dempsey was arguing before the Tribunal that judicial compartmentalisation trumped the arguments in favour of recusal, the Tribunal was right in paragraph 14 to reject it. I do not accept that the Judge's ability to compartmentalise was any more than one of many factors in the present case. The Tribunal was aware of it. I do not accept the argument it was required to give it determinative weight. Whilst I accept that Judges

will often, and perhaps usually, be able to put irrelevant considerations out of mind, this does not alter the fundamental nature of the test to be applied, as set out in **Porter v Magill**. That is, I think, what the Tribunal was saying at paragraph 14. It was the correct approach.

38. I accept Mr O'Dempsey's charge (based on his criticism of the Tribunal's approach to **May**) that the fact of having information prejudicial to one party is what is crucial, not the method of communication of that information to the Judge. The starting point is possession of relevant information unknown to one party. Information supplied by a more legitimate route is just as much information of which that may be true. The essential questions are whether there is information, whether it is prejudicial to one party, and whether the Judge can put it out of mind. The problem for the Claimants in the present case is not, however, the general ability of the Judge to put irrelevant matters out of mind, but that she did not do so for a substantial period of time when her duty was to reveal it. At paragraph 21 where it dealt with **May** the Tribunal was grappling towards the point that it is one thing for a Judge to receive information unknown to one party, when that party knows both that he has some information, even if he does not know what it is, and also that it is provided to the Judge in a system which is carefully designed to balance the need for secrecy of information in the public interest against that party's own rights to know it. The behaviour of the Judge in accepting such information and not revealing it is exactly what he would expect, and indicates no bias. It is different where a Judge receives information, secretly as here, contrary to the interests of a party, given by persons who plainly are hostile to that party and agrees to a suggestion made by them to her which in context was liable to work more harm to that party than the other. Then the party does not know that some information which probably affects him has been imparted, and has no assurance that his rights are carefully balanced in a well-recognised system. This behaviour is not what he would expect, and indicates a preparedness to act adversely towards him.

39. When that position is compounded, as it is here, by the failure of the Judge despite requests to be fully forthcoming as to that which had happened, it is even clearer that Mr O'Dempsey can place no reliance on **May.**

40. The suggestion that matters might be remedied by providing that the officers could be summoned to the Tribunal and cross-examined, does not bear scrutiny. What they said might in whole or in part differ from the Employment Judge's recollection. How could she take this into account without becoming a witness? I accept Mr Laddie's argument that this could not remedy the problem, which in any event was not one of information being put before a Tribunal, but of its conduct in relation to it, and its indicating that it was prepared to act contrary to the interests of one of the parties, albeit only for a short time in the context of the case.

41. As to consequences, the guiding principle was stated in **AWG Group Ltd and another v Morrison and another** [2006] 1WLR 1163. Mummery LJ (with whom Latham and Carnwath LJJ agreed) allowed an appeal against a Judge's decision not to recuse himself. The Judge had been faced with an unwelcome dilemma on the eve of a major trial for which costly arrangements had been made. His withdrawal would have had serious consequences for the parties and for the administration of justice. Mummery LJ said at paragraph 6:

> **"Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under article 6 of the Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be breached, the Judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance."**

42. He returned to the same point at paragraph 20:

> **"…I do not think that disqualification of a Judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case**

> **the Judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an Appellate Court is well able to assume the vantage point of a fair minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias."**

43. At paragraph 29 he spoke of the Judge's concerns about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, but said:-

> **"In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice which must be, and must be seen by the litigants and fair minded members of the public, to be fair and impartial. Anything less is not worth having."**

These are strong words. They ask and answer what justice is. I would accept that this is a central question. One answer would be that justice consists not only in reaching the "right decision", but doing so within a reasonable time. It might be said that there is a tension, or balance between the two: the longer that time is spent, the more likely it might be that a "correct" decision may be made: but if it took so long to do it that the point of the litigation was defeated, time spent in seeking to achieve justice would in fact have had the opposite effect. So, too, it may be with costs. The introduction of the CPR was in large part because it was unjust to reach a decision, however fair and however timely, at too great an expense. Further, it may be unjust for other litigants to suffer the knock-on effects of disproportionate time, effort and cost being expended on one case, depriving those others of access to the Court for their cases in the interim, and delaying justice for all by attempting to do it better for one. What is just may therefore involve a balance of factors, and to that extent resemble a decision made by weighing multiple factors. The decision in **AWG Group Ltd**, is, however, to the effect that where there is a real possibility of the appearance of bias the very essence of justice has been denied. Time, cost, and the disproportionate expenditure of resources cannot outbalance a real risk of a decision which is partial to one party, or irrationally hostile to the other. Article 6:-

> **"In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law"**

itself places a primacy on the fairness of the hearing and the impartiality of the Tribunal.

44. During the hearing, the parties were referred to the internationally accepted Bangalore Principles of Judicial Conduct. The second of those principles is impartiality. At Article 2.5 the Principles provide materially as follows:-

> **"A Judge shall disqualify himself or herself from participating in any proceedings in which the Judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the Judge is unable to decide the matter impartially… provided that disqualification of a Judge shall not be required if no other Tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."**

45. Mr Laddie argues that the Bangalore Principles recognise that the consequences can, as Mr O'Dempsey submits, be taken into account – but only in the very limited and extreme set of circumstances to which they make reference. If a balance is to be struck, despite what the Court of Appeal said in **AWG**, Bangalore strikes it at a point which the facts of the present case could come nowhere near to reaching. Another Tribunal can be constituted. There are no urgent circumstances of the kind envisaged by Principle 2.5. The Claimants are respectively a manager of a solicitors firm and a family law solicitor. Though it may be undesirable, they are capable of representing themselves should they have to do so. A just conclusion remains available – critically, delivered by a Tribunal which is not only unbiased but is seen to be so.

46. In conclusion, I reject both that the Tribunal erred in that it should have but did not take "compartmentalisation" into account and that the consequences of the decision invalidate it.

47. I reject, too, the argument that because the Tribunal consisted of three persons there was a sufficient safeguard against the risk of bias of one. Litigants are entitled to have the unbiased conclusion of each and every member of a Tribunal before whom they appear. To hold otherwise would not only be to bring justice into disrepute, but have the practical difficulty of attempting to unravel the effect that one might have had upon the others.

48. The central importance of the reality and the appearance of impartiality must always be a consideration. Here, I have no doubt that the Tribunal's decision was correct. For me, the most significant aspect of the facts was not the possession of information which one party did not have, but was the conduct of the Tribunal. As Mr Laddie QC submitted, this was recognised by the Tribunal itself, and summed up in the last sentence of paragraph 20:

> **"It is the circumstances surrounding the document and the visit by the police. Irrespective of motives or reasons, the visit happened, information was given to the Judge in the absence of the parties and there was a delay in informing the parties of that."**

49. In argument before me, consideration was given to the hypothetical case of a Judge offered a small sum of money to find in favour of one party. Suppose he did not reject, but instead accepted the offer, and then, having done so, thought better of his conduct after a week, and told the parties what had occurred. Should he recuse himself? Mr O'Dempsey felt bound to submit that he should: the very acceptance of the sum without telling the parties of the approach, and failure to inform them for a week, told the parties something about the nature of the Judge who was hearing their case, which made it unacceptable that he should continue. Mr Laddie QC argued there was no difference in principle between that case, and the present, such that Mr O'Dempsey's response was revealing.

50. I must make it absolutely clear that this case is emphatically not one of bribery, nor is it near it. There is no suggestion of personal gain as there is in the hypothetical example. Nor did

she keep the fact of the approach from the acting REJ. This was rather an error of judgment. I should also record that I have some sympathy for the Judge, since she was asked out of the blue to see Police Officers, persons whom she may have thought had some legitimate security concern to raise with her which affected the management of the Tribunal. She displayed integrity by deciding to inform the parties at a time when it must have been embarrassing for her to do so, since it revealed her own failure to do it earlier. I doubt the decision was easy to take even if it should have been made at an earlier stage. It is to her credit that she took it. But all that said, she put herself in the position of someone who had accepted, secretly, the blandishments of a third party for a reason which, being unknown, is not known to be even arguably a good one. In her preparedness to accept apparently without question the request to keep information secret when that worked predominantly against the interests of one party she showed that in this case she had been prepared to behave in that way, even if this was through inadvertence or a misguided view that she could "compartmentalise".

51. Unfortunately, her inaction has been compounded by the lack of answer to the obvious questions posed above. Had she continued to hear the case, it would have left an obvious danger that someone who had shown by her conduct that she had been prepared in this case to accept an invitation to act adversely to the interests of one party might still be in possession of information contrary to that person's interests, without having fully revealed it. Both she and the other members of the Tribunal were right to regard that as a powerful case for recusal, and she acted honourably when together with them she accepted that case.

Final Words

52. The information so far available about the actions of the Police Officers is strongly suggestive of an improper attempt to interfere with justice. However, it would be unwise to conclude that this is necessarily the case. I have not heard from the Officers nor on their behalf.

The full extent of that which they said to the Judge and acting REJ is unknown. It is surprising that the acting REJ and the Employment Judge did not refer the matter to more senior Officers, to the President of Employment Tribunals or for that matter to the Attorney General, but there may be good reason for that, and it may be that some satisfactory explanation was given by the officers of the reason for their visit, and for their request that what they said should not be disclosed to the parties. It is plain, however, that further investigation is required. It is also surprising that even though recusing itself the Tribunal did not give the further information identified at paragraph 25 above.

53. Judge Clark thought that guidance might be needed. This case is extraordinary and it is to be hoped its like does not happen again. But these principles and points may be stated: -

> (1) Where a third party proffers information or opinion about the merits of a case, or the parties in it, to a Tribunal, without being invited to do so, the parties should be made aware of what has happened without delay. This plainly does not cover a request by a third party for information about the arrangements for the case (such as when a case is likely to be heard), but the principle of judicial independence is such that it applies however influential or authoritative the communicant appears to be.
>
> (2) There may be many good reasons for third parties to communicate with a Tribunal, not about the substance of the case, but in respect of issues surrounding it which are of no direct relevance to the decision. In particular, the Police or security services, security guards and others generally responsible for the security and welfare of those participating in a Tribunal may, for instance, wish to give advice, or warn of particular risks. It may well be self-defeating for such information to be revealed outside the members of the Tribunal. Nothing in this judgment should

affect communications relating to the administration of the case, and the security of those concerned in it. Judges should expect to be warned of risk even if that is said to arise from one party: the parties should expect Judges to put that information to one side when reaching a decision upon the merits of the claim before it, as Judges are accustomed to doing. No adverse inference should emerge from keeping such communications quiet.

(3) An Employment Tribunal Judge or Lay Member, however inexperienced they may be, is fulfilling a judicial role. Their impartiality is critical. It is inextricably linked with their independence from State or other third party interference. A Judge approached by those apparently in authority should be clear as to the purpose of the approach, and should re-buff (and if appropriate report) any which appears to interfere with that independence.

(4) If in any doubt, the Judge should be free to raise a concern with more senior Judges and discuss the issue with them. As with advice about administrative arrangements and security, the purpose of seeking and being given any advice from those consultees does not relate to the merits of the case and a Judge is not to be thought to be acting improperly to be seeking it and considering it, when thinking through what the principles of open justice, fair trial, impartiality, independence, integrity, propriety, and equality require.

(5) There may sometimes be information which one party, or another on their behalf, wishes to give whilst requesting that it remains confidential to the decision-maker(s). Generally, the Tribunal cannot accept information on such terms.

(6) There are some exceptions to (5) which are provided for by Rule and by Statute – for instance, in cases involving National Security.

(7) There may be other exceptions to (5), such as those in which there may be a serious risk to the security of the individual (such as in cases where there are

credible grounds for thinking there may have been domestic violence, or slavery) or where revelation would be a significant breach of the privacy to which that party may be entitled (e.g. where to reveal full medical records may reveal embarrassing personal details which have no direct relevance to the case). These may require a balance to be struck between the potential for interference with the fundamental rights involved and the requirements of transparent justice, itself a fundamental right.

(8) However, in cases such as those in (5) and (7) there should usually be little difficulty in informing the parties that an approach has been made, and/or that information has been received, together with a request to keep it confidential, which the Tribunal proposes for good reason to honour. If that is done, then if the Tribunal gives an assurance that the information imparted is not directly relevant to the issues it has to determine this must generally be respected, and will not give rise to any question of recusal.

(9) Finally, the guidance above is merely that: just guidance. It cannot hope to prescribe for all the many circumstances which may unexpectedly occur. Their applicability will depend heavily upon the particular circumstances. That said, I do not think Judges will go far wrong if they ask how they would wish to be treated if they were in the position of either of the parties, and act accordingly.

54. Given the context of this case, I have shown the guidance in draft to Judges of the Employment Appeal Tribunal and to the President of Employment Tribunals for their respective comments. They have had no input into the decision itself, which is entirely mine. The President of Employment Tribunals adds that wherever it is administratively possible and practicable, any approach or communication from a third party concerning a case which is in progress should be filtered through the Regional Employment Judge, who will be best placed to

judge whether the Employment Judge hearing the matter should be informed, or the third party advised to approach the litigants, or to make a suitable application to the Tribunal, or refer matters to another appropriate agency or, for that matter, warned of the potential dangers and consequences of their approach. This seems to me to be sensible advice.

55. For the reasons I have given, the appeal is dismissed.