Appeal No. UKEAT/0266/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

PROFESSOR C D FRASER — APPELLANT

UNIVERSITY AND COLLEGE UNION & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS NABILA MALLICK (of Counsel) Direct Public Access
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Employment Tribunal dismissed the Claimant's claims. The Claimant did not appeal that decision.

The Respondent applied for costs. The Claimant applied for an order that the Employment Tribunal recuse itself from hearing the costs application on the ground of apparent bias arising from, *inter alia*, the content and tone of questions and comments made by one of the members during the substantive hearing.

The Employment Appeal Tribunal concluded on balance that the content and tone of the member's questions and comments had been as described by the Claimant and that they gave rise to an appearance of bias which meant that, notwithstanding that he had not appealed against the substantive decision, the Employment Tribunal ought to have recused themselves from hearing the costs application.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by the Claimant against a decision of the Employment Tribunal, sitting in Central London, which was sent out on 7 March 2014. The Tribunal consisted of Judge Woffenden and lay members, Mr Rao and Mr Carter. The decision against which this appeal is brought was a decision by a majority, Mr Rao dissenting. The decision was that the Employment Tribunal refused an application by the Claimant that they, or at least the two of them other than Mr Rao, should recuse themselves from hearing the Respondent's application for costs on the grounds of apparent bias. That application for costs had followed from a Judgment which had been sent out on 2 February 2012, which itself followed a period of hearing and consideration lasting apparently 11 days between 7 April 2011 and 5 October 2011. That Judgment had rejected the Claimant's claim for race discrimination and victimisation against the Respondent trade union and the other three named Respondents, who were officials thereof.

2. I cannot help, at the very opening of this Judgment, expressing some disquiet at the delays that have occurred in this case since 7 April 2011 when the hearing of the substantive claim apparently began. I also note, before going any further, that the Respondents have chosen to play no role in the appeal on, I have no doubt, pragmatic grounds.

Background facts

3. The background to the claim is this. The Claimant was a Professor of Economics at the University of Leicester from 1995. He describes himself as black British, of Afro-Caribbean origin. He was a member of the Respondent trade union and, as I have already said, the second

to fourth Respondents were officers of the union. His dispute with his union arose out of another dispute with his employer, the University of Leicester, which had started in 2009 and gone into 2010. He had requested assistance from the union. In particular he requested the assistance of a case worker from outside his region and, in particular, a Mr Bill Gulam. It was his claim in these proceedings that the union did not take his complaints against the University of Leicester as seriously as they should have on the grounds of race discrimination.

4. The Employment Tribunal heard evidence over, I am told today, three-and-a-half days in April 2011. As I have already indicated, the Judgment of the Tribunal indicates that it occupied their time for 11 days including three in June 2011 and three in October 2011. I am bound to say I am puzzled how it could have required six days of discussion and then a further three months or more before a Judgment could be issued because the main substantive Judgment is dated 18 January 2012 and was sent out 7 February 2012. In any event, the Judgment, which is 45 pages long, dismissed the Claimant's claims. The final paragraph, paragraph 41, to which the Claimant takes particular exception, says this:

> **"We have found no facts from which we could conclude that the claimant was discriminated against on the grounds of his race or victimised as a result of a protected act. The first respondent's behaviour was not, as was put in submissions, utterly unreasonable nor, though in relation to the behaviour of the third and fourth respondent [sic] it was not frank in its dealings with him, was its treatment of him shoddy and there is no basis on which race discrimination should be inferred. … [They then deal with a particular rule which I do not think I need trouble with.] The claimant is an extremely intelligent and demanding union member who had been engaged in a long standing dispute with a colleague and, as a consequence of its failure to find in his favour in relation to those matters, his employer. He deployed his considerable analytic skills and powers of persuasion in correspondence to secure the support to which he believed his membership of the union entitled him and be permitted to choose his representative from outside his region. When he met with resistance or a lack of clarity in responses to his correspondence he became frustrated and increased his efforts in both speed and frequency, escalating and extending the range of recipients to more senior personnel. The claimant feels that he has been treated wholly unreasonably and deplorably by the respondents and attributes his treatment to being on racial grounds. His assertions in both respects lack merit. What occurred here was a difference of opinion between a union and its member about who was the appropriate person to provide representation. The claims fail and are dismissed."**

5. Following that Judgment the Respondents applied for costs in a letter dated 2 March 2012 on the basis that the Claimant's claims were misconceived and unreasonably and vexatiously pursued. Their claim was for a total of £53,878.

6. The Claimant responded to the application in a four-page letter dated 7 March 2012 giving reasons why the application for costs was hopeless and supporting his submission that any costs hearing would be disproportionate and contrary to the overriding objective. There was no mention in that letter of any question of bias on the part of the Tribunal.

7. It seems that on 19 March 2012 the Tribunal wrote to the parties saying that a costs hearing would be listed in due course. I have no idea why, but the next document in the file is dated 2 April 2013, which is over a year later, so something must have gone wrong at the Tribunal. On that date, 2 April 2013, the Claimant put in a substantial document headed "Application that Respondent's Cost Application be Struck Out or the Original Panel recuse". On the second page of that document he said this, at letter (c):

> **"The costs claim has been made only because the Respondent was encouraged to make it due to the disorderly and biased way the hearing was conducted and because the Judgement, reflecting that bias, contained incontrovertibly untruthful claims about the nature and outcome of workplace grievances for which the Claimant had unsuccessfully sought representation from the Respondent. These untruthful claims were perverse as they contradicted unchallengeable documented facts. The untruthful claims reflected badly on the Claimant's character and credibility while reflecting favourably on the Respondent, when the truth did the opposite, and suggested to the Respondent that a cost application would be favourably received by that Tribunal."**

Then at letter (d) he said this:

> **"Alternatively, the Claimant requests that the original panel recuse itself because two members, the Judge and Mr Carter, demonstrated manifest bias towards him.**

At page 104 of my bundle, which is still the same document, but I am not sure what internal pagination applied, there was a heading "The conduct of the hearing", and the Claimant said this:

> **"The Claimant asserts that from the start of the hearing and throughout the Employment Judge and Mr Carter were openly hostile to him and appeared to have joined the action as parties on behalf of the Respondent with their minds already made up. …"**

Then he refers at paragraph 52 to Mr Carter's behaviour being sarcastic and:

> **"… openly characterising his case to him and the Respondent's witnesses as one where the Claimant felt that he did not have to obey the Respondent's rules. …"**

He mentions some particular comments, which I will deal with later, made by Mr Carter. He also said this, at paragraph 67 of the document:

> **"The Claimant did not appeal against the Judgement of the Tribunal although he believes that it is wrong and reflects bias and predetermination against him and was appealable. A failure to appeal a Judgement has no bearing on whether there should be a cost hearing or on the outcome of an appeal against costs or whether a cost hearing should occur before the same Tribunal as for the substantive hearing. …"**

8. The actual hearing of the costs application did not come on, again for reasons that are not clear, perhaps to do with getting the panel of three together, until 6 December 2013. At that hearing the Claimant applied at the outset for the Employment Tribunal to recuse themselves from dealing with the application for costs. I should say he was represented by Counsel. He had produced, on 4 December 2013, a witness statement setting out the factual matters on which he relied in support of that application. The Respondents, I am told, who were represented by the same Counsel as had represented them at the substantive hearing, put in no evidence and their Counsel, perhaps unsurprisingly, said he had little recollection as to what had happened at the substantive hearing.

9. As I have said, the Employment Tribunal dismissed the application that they should recuse themselves by a majority. For some reason they did not send out their Judgment to that

effect until 7 March 2014, and it appears that the hearing of the application to recuse took so long that they were not able to go on and actually decide the costs application. So that application remains as yet unresolved, although the substantive decision to which it relates was made getting on for three years ago.

The law

10. I turn very quickly to the relevant law. The leading authority is **Ansar v Lloyds TSB Bank & Ors** [2007] IRLR 211. The relevant propositions stated by Burton J were as follows:

> **"1. The test to be applied as stated by Lord Hope in *Porter v Magill* … in determining bias is:**
>
> > **whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.**
>
> …
>
> **5 The EAT should test the employment tribunal's decision as to recusal and also consider the proceedings before the tribunal as a whole and decide whether a perception of bias had arisen …"**

I add, in parenthesis, that my understanding is that, if necessary, the EAT must itself, as best it can, make findings of fact as to what occurred in the proceedings before the Tribunal. On one matter, I feel compelled to take that very course.

> **"6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection …**
>
> **7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown …**
>
> **10. In any case where there is real ground for doubt, that ground should be resolved in favour of recusal …**
>
> **11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise if …**
>
> > **(d) on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind …"**

The Claimant's complaints

11. I turn, then, to the complaints raised by the Claimant, which he says would lead a fair minded and informed observer, having considered the facts, to conclude that there was a real possibility that this Employment Tribunal was biased against him. I will try and consider them in chronological order in the order they would have happened.

The bundle

12. The first matter relates to the document bundles that were produced for the bundle, and the Claimant says this, in his witness statement:

> **"5. At approximately mid-day, my Counsel, Mr Choongh, returned from a conference with the Judge and the Respondent's counsel. He said that the Judge was demanding that we go through my document bundle and remove any items duplicated in the Respondent's bundle or not referred to in my witness statement. He said he could not understand why this was and why she [that is the Judge] had rejected what he thought was a reasonable suggestion by him: that the panel go to wherever in each party's bundle or witness statement the relevant counsel took the panel to. This seemed to me a proportionate use of the time available to the Tribunal to hear all the evidence and adjudicate upon my claims.**
>
> **6. I could not understand this demand, which immediately suggested that my documents and evidence had been prejudged to be inferior to the Respondent's or irrelevant. I did not see how or why the Judge could have come to this conclusion when the hearing had not even started. I did not see why this requirement had been imposed on me but not on the Respondent. …"**

The Employment Tribunal dealt with this complaint at paragraph 7 of its Judgment on recusal in this way:

> **"The Respondent had prepared a bundle of documents for use at the full merits hearing. The Claimant (who was not at that time legally represented) had prepared his own bundle of documents. It was not possible for the parties to reach agreement as to the contents of one bundle of documents. The Claimant's bundle contained documents which the Respondent considered irrelevant or duplicates of those already contained in its own bundle. The Employment Judge asked the Claimant (who was by that point assisted by Mr Choong [sic]) to remove those documents from his bundle which were either irrelevant or duplicated. Mr Choong [sic] returned in due course to the Tribunal having left in the bundle all the documents which he considered relevant to the issues in dispute. He said that they had not had time to remove duplicated documents and he had had no choice but to leave certain documents within the bundle because the Claimant had referred to them in his witness statement. Both the respondent's and the claimant's bundles were therefore before the Employment Tribunal at the full merits hearing and the way in which the Tribunal approached the issue was entirely straightforward and consistent with principles of good case management designed to reduce the number of unnecessary documents before the Tribunal, if possible."**

13. It seems to me that paragraph 7 is a cogent and full explanation of what happened. Whatever the precise terms of the request, as made by the Tribunal or understood by Mr Choongh, or understood by the Claimant in turn, it seems to me that the Tribunal was clearly attempting as a matter of case management to sort out the documents before the case began. Whatever happened could not, in my view, possibly have given rise to the appearance of bias in the eyes of a fair-minded and informed observer.

Mr Carter's questioning

14. The second matter of which complaint is made is questioning of the Claimant at the end of his evidence by Mr Carter, a member of the Employment Tribunal. The Claimant, in his statement, says this about the questioning:

> **"12. I believe that my questioning by Mr Carter was aggressive and revealed bias and predetermination. His first question was, "Why do you believe that you don't have to obey UCU's rules?" I told him that I did not believe that: I had always obeyed rules. It was UCU that had not obeyed its own rules while repeatedly telling me that it was treating me as it had always treated others. ...**
>
> **13. Mr Carter then asked me why I had not told Mr Constantinou, UCU's Local Association … rep that I believed that he was discriminating against me in his reaction to my racial discrimination complaint against my employer and, particularly, my Vice-Chancellor. I told Mr Carter that I had wanted to separate from him non-confrontationally, that I was already experiencing enough stress and anxiety, for which I was being treated. I said that I had always tried to be conciliatory, until I was given no alternative but to not be. I then pointed out how the University's Grievance Committee's Report had upheld my complaint of being harassed by a colleague and had complimented me precisely on my conciliatory approach and my measured responses and restraint despite what I had faced.**
>
> **14. Mr Carter appeared to become incensed at what I said. He asked, "So you are Mr Nice Guy, are you?" I was shocked. I believe that everyone in the Tribunal was taken aback by his remark. I believe that his rhetorical question was intentionally so framed to reflect the contempt that Mr Carter felt for my case. It appeared to encapsulate his sentiments towards me: he would pay lip service to my evidence, whilst having already settled upon a path to rejecting my claims. This is to be contrasted with the way in he approached the Respondent's witnesses. No reasonable tribunal panel member would have behaved towards me as Mr Carter did.**
>
> **15. Mr Carter continued in a similar vein throughout the hearing. He invariably asked the Respondent's witnesses why, as I believed that I did not have to obey its Rules, and given that its Rules did not allow a member to have an external rep, they had not just told me that I could not have one?**
>
> **16. I believe that Mr Carter was trying to provoke a reaction from me. The Respondent's witnesses were looking at each other and smiling at the slant of his questioning. I believe that they had been reassured from the outset by his hostile manner towards me that he was also on their side. I remained calm throughout what I perceived as his baiting but, eventually, I did ask Mr Choongh to emphasise to the Judge that how Mr Carter was characterising my behaviour was not how I saw it. Mr Choongh did this."**

The Employment Tribunal dealt with this at paragraph 9 of its Decision:

> **"… As far as the questions posed by Mr Carter to the claimant are concerned, the majority of the Tribunal recall that questions were posed by him to the claimant but not in the way recalled by the Claimant. Questions were posed by him firmly but not aggressively. One of the members of this Tribunal (Mr Rao to whose presence as a member of a tribunal hearing the respondent's cost application the claimant has no objection) has considered in particular the questions and attitude attributed to Mr Carter at paragraphs 12 and 14 of the Claimant's witness statement … but is unable now to recall either whether such questions were asked by Mr Carter and if so in what tone. On that sole basis only he has concluded having regard to principle 10 in the Ansar case [that is when there is real doubt] … that there is very real ground for doubt in relation to the appearance of bias by Mr Carter and since that is the case he goes on to conclude that doubt should be resolved in favour of recusal by this employment tribunal.**
>
> **10. The majority of the Employment Tribunal have also reminded ourselves of principle 2 of the Ansar case 'If an objection of bias is made, it will be the duty of the chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance'. The majority of the Employment Tribunal conclude that the questions, comments and tone attributed to Mr Carter by the claimant, even if they were made in the way alleged did not give 'the appearance of a closed mind against a party on a matter which calls for decision by the tribunal when that party had not presented all its evidence relevant to the point or had the opportunity to address the Tribunal on that evidence', the circumstances in which the EAT said in the case of *Peter Simper & Co Ltd v Cooke* … the impression of bias could be given."**

15. Faced with that material, it seems to me that unfortunately I have to make some kind of factual finding about what happened at the Tribunal in relation to Mr Carter's questioning. This is always a difficult task, and is particularly so with the evidence presented in this way.

16. I note first the Claimant did not raise the question of Mr Carter's behaviour in an appeal. He only brought it up in 2013 when he was facing the costs application. I also observed in the course of the hearing that his evidence in the witness statement certainly could not be categorised as 100% reliable. At paragraph 21 he said:

> **"… I was not surprised to find myself characterised as irascible, unreasonable, ungrateful, disingenuous and so on [he is there referring to what is said in the Judgment] …"**

I could not find, and I was not referred to, anything that justified him saying that he had been characterised in those ways.

17. Two of the Employment Tribunal members, including the one allegedly responsible for the line of questioning objected to, say that they remember questions being posed but not in the way recalled by the Claimant. They say that the questions were posed firmly but not aggressively. They say that even if the questions were made in the way alleged, that did not give rise to an appearance or a closed mind. It seems to me that they are somewhat equivocal in those statements and at the very least do not seem to be expressly denying that Mr Carter made the remarks about not having to obey any of the rules and about the Claimant being "Mr Nice Guy".

18. Mr Rao was simply not able, he said, to recall either whether such questions were asked or if so in what tone. It seems to me significant that Mr Rao was not prepared to say that what the Claimant said had happened had most certainly not happened.

19. The Respondents, as I have already indicated, have said nothing as to what they recall having happened at the Tribunal.

20. Taking all this material into account and notwithstanding the late stage at which he raised his complaints I find on balance that the Claimant's account at paragraphs 12 to 16 inclusive of his witness statement is an accurate and true account of what did happen at the Tribunal. Before saying any more about this, I will pass on to his other complaints.

Assistance to the Respondents' witnesses

21. The third complaint was set out in paragraph 19 of his witness statement, where he complained about the Judge's continual assistance to the Respondent's witnesses when they got

stuck and that he often offered answers to them. The Claimant goes on to make a rather disparaging remark about the experience of the Employment Judge.

22. That allegation is not addressed at all in the Judgment on recusal, which is unfortunate. It is hard to know exactly what is involved from the Claimant's very brief statement, but it seems to me very likely that what he is describing is a perfectly normal course of events in a hearing where a Judge very often intervenes to assist a witness and that whatever he saw does not mean that there was any real possibility of bias.

The Judgment itself

23. That brings me to his fourth set of complaints which relate to the Judgment itself. I have already read out the conclusions at paragraph 41 to which he took exception. It seems to me that those conclusions were a necessary part of the Employment Tribunal's Decision and did not in any way justify the description of the way he had been characterised, which he set out in paragraph 21 of his statement.

24. In my judgment they do not show apparent bias at the time of the Judgment or bias of the sort that is described in **Oni v NHS Leicester City** [2013] ICR 91 in relation to the subsequent costs application. In particular, to say that the Claimant's assertions about his treatment and the grounds for it "lacked merit", as they do at the end of paragraph 41, seems to me in no way to be unnecessary and does not seem to me to prejudge any costs application, although oddly enough the Employment Tribunal, at paragraph 12 of the Judgment in the recusal application, seems to have thought otherwise.

25. Miss Mallick, on behalf of the Claimant, drew my attention to various errors and omissions in the Judgment, which she said were indications of apparent bias. It is right, so far as I am aware, that there is no reference in that Judgment to various documents that would have been before the Tribunal, documents concerning the Claimant's entitlement to a case worker from outside his area and the fact that Mr Gulam had acted for others outside his own area. There was no reference to documents showing the outcome of his complaints against the University, and there was no reference to documents showing that there were complaints by the Black Members Standing Committee about the treatment of black members of the Union. There were also at least two straightforward errors of fact in the Judgment. One is that at paragraph 2 it says that the Tribunal had before it an agreed bundle of documents consisting of two folders. As I have already indicated when I was describing the events relating to documents, that was simply wrong. There was a Respondent's bundle and a Claimant's bundle, which were not agreed. Of more significance, perhaps, is that in two places the Tribunal said that the Claimant had failed on his appeal in relation to his complaints against the University on a claim of harassment against the new Head of Department, which was wrong.

26. So there were some omissions of references to documents and there were at least two errors. In my view those errors and omissions simply do not indicate that there was a real possibility of bias on the part of the Tribunal. A fair-minded and informed observer, in my view, would be much more likely to have come to the conclusion that the reason for such errors and omissions was the large amount of evidence that the Employment Tribunal had had to muster and, more importantly perhaps, their delay in preparing their Judgment.

Conclusions

27. So we are left only with Mr Carter's questioning, as to which I have made findings already, and which led to Mr Rao saying that it was inappropriate for the Employment Tribunal of which he was a member to hear the costs application.

28. I confess I am somewhat uneasy that a line of questions put by one member of an Employment Tribunal early on in a hearing should disqualify that Tribunal from hearing an application for costs made some time later when no appeal had been brought or was intended to be brought against the substantive decision dismissing the claims. But the words used and the tone of the questions, as I find them to be, lead me, as they led Mr Rao, by a narrow margin to the view that a fair-minded and informed observer would conclude that there was a real possibility that Mr Carter was biased against the Claimant and that that bias, albeit demonstrated two years previously, would continue in relation to the later decision which the Employment Tribunal would have to take in relation to costs. In those circumstances, it is my judgment that the Employment Tribunal should have recused itself as a whole in relation to the costs application and should have made arrangements for that to be heard by another constitution of the Tribunal.

29. To that extent this appeal is allowed. I will order that the costs application, if it is persisted in by the Respondents, should be heard by a fresh Employment Tribunal. That Employment Tribunal will simply have to decide the application working with the substantive Judgment as it stands and any other relevant material that is produced for it.