Appeal No. UKEAT/0497/13/JOJ
UKEAT/0498/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 March 2014

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

MENZIES DISTRIBUTION LTD — APPELLANT

MS M MENDES — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEAL FROM DEPUTY REGISTRAR'S DIRECTIONS

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APPEARANCES

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SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

The Employment Judge held a Pre-Hearing Review on 6 December 2012 on the question of whether the Claimant had a disability. He heard evidence and submissions. He reached a decision, namely that the Claimant was disabled, and announced that orally at the end of the hearing. He gave no reasons, orally intending, it seems, that the reasons be given in writing. The tape of the hearing was lost. The Employment Judge indicated that he could no longer give reasons as he could no longer remember part of the case and there would need to be a re-hearing of the issue as to whether the Claimant was disabled.

He then conducted the re-hearing himself on 19 June 2013. He heard evidence and submissions and reached the same conclusion as he had on the earlier occasion. In his written reasons, he stated that he had reached a firm conclusion on the issue on 6 December 2012. He also indicated that he did not need to recuse himself from the hearing on 19 June 2013 as he had not given an indication of his conclusion and the rule against the appearance of bias did not reply.

In the circumstances, a fair-minded observer, knowing the facts, would consider that there was a real possibility of bias at the hearing on 19 June 2013. The Employment Judge had announced a firm conclusion – not a provisional view – at the hearing on 6 December 2012. In those circumstances, a fair minded observer would consider that there was a real possibility that the Employment Judge could not consider the issue impartially on 19 June 2013 but would be bound to be influenced by his earlier decision.

THE HONOURABLE MR JUSTICE LEWIS

Introduction

1. There are before me two appeals against a refusal by the Deputy Registrar to allow two applications. The first relates to an appeal which is due to be heard today. It is an appeal alleging an appearance of bias on the part of the Employment Tribunal in dealing with certain issues at a Pre-Hearing Review on 13 June 2013. That appeal is to be dealt with, as I say, today. The other appeal relates to the decision of the Employment Tribunal that certain matters either did not involve amendments to the claim or, if they did, permission to amend should be granted. That appeal is also listed for today.

2. Before I turn to those substantive appeals, however, there were procedural matters that had to be dealt with. The applicant applied in early March to amend the Respondent's answer in the bias appeal. The answer had originally said that the Respondent, Ms Mendes, had instructed the solicitors not to oppose the appeal. In relation to the amendments appeal there was simply no Respondent's Notice filed at all.

The application to amend the Notice of Appeal

3. The Notice of Appeal was initially dealt with by the President, Langstaff J, who had indicated in relation to the bias appeal that the Respondent to this appeal may wish to consider observations that he had made and if she considered that the full appeal would succeed she may agree not to oppose it. An order was made requiring a Respondent's answer within 14 days of the date of the order, which was 22 November 2013. As I say, the answer was given that the solicitors were instructed not to oppose the appeal.

4. On either 6 or 7 March 2014 an application was made to amend the Respondent's Answer and to state that the Respondent would oppose the appeal and would contend that there was no appearance of bias on the part of the Employment Tribunal Judge. There have been considerable arguments as to what that letter meant, and the surrounding correspondence. On any analysis, it is clear to me that the Respondent was indicating she would not oppose the appeal and she would not present arguments or evidence in opposition to the appeal. It is now clear that the Respondent does with to oppose the appeal and does wish to put forward arguments. I have considered very carefully the decision in **Khudados v Leggate** [2005] IRLR 540 in particular paragraph 86(a). In my judgment, the applicant has delayed in making it clear in relation to the bias appeal that she wished actively to oppose the appeal. In my judgment, she should have decided that on 13 December 2013 when she put in her Notice of Appeal. She should certainly have notified the Tribunal and the Appellant that she was proposing to apply to amend her Respondent's Answer. The explanation that has been given is, in my judgment, inadequate. The suggestion is that the Respondent has simply changed her mind and that, as the date of the appeal hearing loomed, she wanted to participate and she wanted to try and preserve the judgment of the Employment Tribunal. In my judgment, both the delay and the absence of any explanation count against granting permission to amend. However, in the unusual circumstances of this case, I am satisfied that there is, despite the persuasive submissions of Mr Rajgopaul, no real prejudice to the Appellant.

5. I am also particularly influenced by this fact. The Employment Appeal Tribunal would, in any event, have had to decide whether or not this appeal should be allowed. Given that the appeal concerns whether or not there was an appearance of bias on the part of an Employment Tribunal Judge, it would have wanted to scrutinise that issue very carefully and would have wished to be satisfied about the relevant law. In those circumstances, an appeal is inevitable.

Arguments of law would have been inevitable. In my judgment, there was no real prejudice to the Appellant. Mr Rajgopaul refers to the fact that his original skeleton argument was drafted on the basis that there would be no opposition. That is correct. But he will, I am sure, be able to deal with any points of law that arise, and he has indicated he is not seeking an adjournment.

6. He has raised the question of costs. That can be dealt with, if relevant, should any application for costs be made. He has referred to the substance of the rules governing bias, but those matters are better dealt with, in my judgment, on the hearing of the appeal. And in relation to evidence, he submits that he would have wanted to adduce some of the evidence from the Pre-Hearing Review to show that there were disputed issues of fact. If that had been a real issue, he could have sought an adjournment, but he has indicated he does not seek an adjournment.

7. I bear in mind also the interests of justice. It is in my judgment an unfortunate way for the Respondent, Ms Mendes, to have conducted proceedings in this case. She should have put in her Answer on 13 December 2013, saying what her position was in relation to the appeal. I do not think the way she has behaved is conducive to the interests of justice. But, as I say, in the circumstances, the court would have had to look carefully at the arguments in relation to bias. Therefore, in my judgment, it would be a disproportionate to prevent the Respondent from appearing. I therefore will allow her to amend her Respondent's answer and to put in the answer dated I think 7 March 2013.

The application for extension of time

8. Much the same can be said in relation to the other appeal, the appeal in relation to the amendments to the claim. In my judgment, Ms Mendes should have put in her Answer on

13 December 2013. There is no explanation for her failing to put in any Answer at all. In my judgment, there is no real acceptable explanation as to why she chose to do so at such a late point in the day. However, in all the circumstances of this case, I consider that there has been no prejudice and it would be disproportionate to refuse to extend time and to prevent the Respondent participating in the appeal. In the circumstances, therefore, I grant an extension of time for the Respondent to put in a Respondent's Answer in the amendments appeal.

The substantive appeals

9. There are before me two appeals in relation to certain judgments of the Employment Tribunal, given after a Pre-Hearing Review on 19 June 2013. One appeal alleges an appearance of bias on the part of the Employment Tribunal in dealing with the issues at that Pre-Hearing Review. I will refer to that as "the bias appeal". The second Notice of Appeal challenges the decision of the Employment Tribunal allowing the Claimant to rely upon certain matters. There are issues as to whether or not that involved an amendment of the original claim and, if so, whether permission to amend should have been granted. I will refer to that as the amendments issue appeal.

10. At the outset of the hearing, I raised with counsel for the parties the best way of proceeding. Both Mr Rajgopaul for the Appellant and Ms Idelbi for the Respondent have been extremely helpful, and extremely pragmatic in the way in which they have approached this appeal in the circumstances in which the appeal has arisen. It seemed to me that it would be sensible to deal with the bias appeal first. If I found for Ms Mendes, the Respondent on this appeal, on the bias issues, then I would have had to go on to consider the amendments issue appeal. Conversely, if after hearing argument in the bias appeal, I allowed that appeal, then it was common ground that the Employment Tribunal should not have gone on to decide the

question of whether or not amendments were necessary or should have been allowed. Depending therefore on the outcome of the bias appeal, it might, or it might not, be necessary to deal with the substance of the amendments issue.

11. Following discussions with counsel, that was the course of action that all parties considered sensible and I directed that the hearing should proceed in that way. Consequently I deal first with the bias appeal.

The procedural history

12. The procedural history of this case is, to say the least, unusual. In April 2012 the Claimant, Ms Maria Mendes brought a claim for unfair dismissal, direct and indirect disability discrimination, personal injury and wrongful dismissal against her former employers, Menzies Distribution Ltd. In brief, Ms Mendes was employed as a warehouse packer. She alleged that she had back problems amounting to a disability within the meaning of the **Equality Act 2010**. She referred also to bullying and harassment. She left her employment in January 2012. She issued her claim on 5 April 2012. The Respondent did not admit that the Claimant was disabled and had denied the various allegations made by the Claimant.

13. A list of issues was prepared by the Respondent for a case management direction listed for 13 July 2012. Amongst the proposed list of issues was whether the Claimant was disabled within the meaning of section 6 of the **Equality Act 2010** between April 2009 and 6 January 2012. A second issue was whether or not the Employment Tribunal should extend time for bringing certain direct and indirect disability claims.

14. A further case management direction was held on 18 September 2012. An order was made providing that there should be a Pre-Hearing Review on 6 December 2012. At paragraph 4 the order says that the Pre-Hearing Review would consider (1) whether the Claimant is or was a disabled person on the relevant dates and (2) deal with other matters including whether it would be just and equitable for the Tribunal to extend time in relation to the Claimant's direct and indirect disability claims.

15. There was a Pre-Hearing Review on 6 December 2012. Employment Judge Milton heard evidence and heard submissions. The Employment Judge reached a firm conclusion at that Pre-Hearing Review that the Claimant was disabled and announced that conclusion at the end of the hearing on 6 December 2012.

16. Rule 30 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** provides that a Tribunal or Employment Judge must give reasons either orally or in writing for any judgement. Reasons may be given orally at the time of issuing the judgment or they may be reserved to given in writing at a later date. The Employment Judge did not give any reasons orally at the hearing on 6 December 2012. It appears that he intended to provide the reasons in writing at a later date. On 9 January 2013 the Employment Tribunal informed that the parties that the tape on which the Employment Judge had dictated his orders and rulings had been mislaid and invited the parties to prepare a draft of his directions. On 21 February 2013 an order was made by the Employment Judge requiring further particulars from the Claimant. The Claimant prepared a Scott Schedule accordingly. The hearing was then listed for 17-21 June 2013. By April 2013 the Employment Judge had decided that there would have to be a further hearing to deal with the Scott Schedule that had been prepared. Furthermore the Employment Judge considered that it would now be difficult for him to

provide reasons for the various conclusions that he had reached on 6 December 2012 as to the Claimant's disability as he could not now recall some aspects of the case. On 19 April the Employment Tribunal therefore wrote to the parties in the following terms:

> **"In view of the delay and the problems which have occurred Employment Judge Milton regrets that he has decided to adjourn this hearing listed for 17th-21st June 2013. The date of 19th June however will be retained for a further Pre-Hearing Review to decide the precise period of the Claimant's disability claim; the scope of any claim for reasonable adjustments and to enable the Respondents to argue for a review of the Judge's conclusion in principle that the Claimant is a 'disabled person' within the meaning of the Equality Act 2010."**

17. Two judgments were issued after the 19 June 2013 Pre-Hearing Review. The first judgment is dated 3 July 2013. Paragraph 1 says the following:

> **"The oral Judgment of the Tribunal given to the parties on 6 December 2012 that the Claimant is declared to be a disabled person is confirmed. It is further declared that for the purposes of these proceedings the Claimant is declared to be a disabled person with effect from 1 December 2010."**

18. The second paragraph confirms that the Claimant was granted leave to present a claim of disability discrimination by reason of a failure to make reasonable adjustments. Paragraph 3 says this:

> **"Insofar as the Respondent sought either by way of an application for a review or in any event that the oral judgment/orders made by Judge Milton on 6 December 2012 be set aside and in their entirety and the case remitted to a differently constituted Tribunal that application is refused."**

19. There was also an interlocutory order made dealing with a counter-schedule to the Claimant's Scott Schedule.

<u>The Employment Tribunal decision</u>

20. Reasons for that written judgment were provided in a long document dated 24 July 2013, and it is necessary to recite a large part of it. The Reasons begin by recording that there had

been a Pre-Hearing Review on 6 December 2012. It records that the Judge had heard the Claimant in person and she had given evidence. It recorded the evidence that had been given on behalf of the Respondent and it referred to the documentary evidence.

21. Beginning with paragraph 5, the Reasons say this:

> **"By the conclusion of the proceedings, after submissions on each side, I had in my mind reached a firm conclusion that I was persuaded that the Claimant had a physical impairment because of her back condition which had lasted for at least a year, and furthermore that in addition to her case already pleaded and/or set out in the List of Issues, she had an arguable case of disability discrimination based on an alleged failure by the Respondent 'to make reasonable adjustments'. I decided that it would be a more useful use of the Tribunal time if I therefore announced my broad conclusions briefly and got on with the directions which, in my judgement, then needed to be made. I therefore announced my broad conclusion that I found the Claimant to be 'a disabled person' for the purposes of Section 6 Equality Act 2010 and also that I was, in principle, granting leave to the Claimant to add a claim of 'Failure to make reasonable adjustments' in respect of which I directed that the Claimant provide Further Particulars."**

22. Paragraph 6 records that the Judge had announced his conclusions and the timetable for directions at that hearing.

23. Paragraph 7 is as follows:

> **"Unfortunately, I may have picked up the wrong type from the desk and linked it to the file for these proceedings or there was some mix up in the transmission of the file plus tape to the Typing Section. By the time I discovered the mix up, when the file was referred back to me after the Christmas break, it impossible to locate my original tape and I therefore wrote to the parties on 9 January 2013 inviting the parties to prepare and agree a list of my main directions."**

The Reasons then record that the order for particulars, dated 21 February 2013, was sent out.

24. At paragraph 9 the Reasons say this:

> **"By 4 April 2013 I came to the conclusion that, in any event, there would have to be a further Hearing to decide whether or not the Claimant should be entitled to proceed with the quite extensive new/elaborated list of claims set out in the Scott Schedule. By that stage I had also come to the conclusion that it was difficult and unsatisfactory for me to provide reasons for**

my various conclusions as to the Claimant's disability and that the original time/jurisdiction issues which I had to determine had been potentially considerably extended by the new Scott Schedule."

25. Paragraphs 11, 12 and 13 are in the following terms:

> **"At the outset of the Hearing on 19 June 2013 Mr Rajgopaul vigorously argued, to put the matter shortly, that I should not be further involved in the proceedings. He argued that he was not and indeed could not ask for a Review since I had not provided any detailed reasons for my conclusions about the Claimant's disabled status.**
>
> **12. I clarified that I had not felt it to be judicial for me to give reasons since there were some aspects of the case which I was unable to recall and, in particular, for example, that I had heard from both the Claimant and Mr Whitehead quite detailed evidence about the mechanics of the large machine called a 'Kardex' machine where the Claimant mainly worked. To my surprise, the Respondent's sole witness at earlier Hearing was not present. Whilst I accept that the letter of 19 April 2013 was quite short, I believe that it should have been obvious that I was giving the Respondent every opportunity to present any argument, and indeed any evidence both to persuade me that my general decision in principle should be reviewed and/or to present any arguments or evidence that the period of time should be limited. The Respondent's general position was set out in a letter of 13 June 2013 and Mr Rajgopaul commenced the proceedings on 19 June with these arguments.**
>
> **13. I did not accept that this was a situation where I should recuse myself from the proceedings. This was not a case where I had given an 'indication' or demonstrated, I believe, anything which could be described as 'bias' and I did not accept that this was a case where the important doctrine of 'justice must be seen to be done' was applicable.**
>
> **14. As I have set out in correspondence, and as I made clear on several occasions orally on 19 June 2013, I am extremely apologetic for what may have been my own lack of care in ensuring that the correct tape was linked to the file. Having said that, however, I believe that in any event there would have had to be a further quite extensive Hearing to enable the Respondents to challenge the wide scope of the Further Particulars set out in the Scott Schedule and for that matter for the Claimant to reply to any such challenge and for myself (probably) to give further rulings about the various allegations in the Scott Schedule.**
>
> **15. I came to the conclusion that procedurally speaking I had issued an oral judgment on 6 December 2012 and that judgment was capable of being reviewed. It had, in any event, been reduced to writing in the correspondence of the parties. I had treated the Respondent's concerns as an application for a Review of that judgment. If I was wrong in that conclusion I treated the proceedings on 19 June 2013 as Review Hearing listed of my own motion. If, alternatively, the correct procedural situation is that there was not a 'judgment' capable of a review then I treated the Hearing on 19 June 2013 as a further adjourned Hearing of the 6 December Pre-Hearing Review. I announced my conclusions on the procedural issue and then called the Claimant to give evidence. I made it absolutely plain, in my oral reasons that morning, that if the Respondent felt disadvantaged by the absence of Mr Whitehead I would accede to any application for an adjournment or further Hearing to enable him to give evidence. No application for Mr Whitehead to be recalled was made."**

26. The judgment then records that the Claimant gave evidence. It records the findings on the documents and concludes by saying that he found that the Claimant was to be treated as a disabled person.

27. The second judgment that the Employment Judge gave was issued on 27 September 2013, and that judgment included Reasons. The judgment says that the Claimant was granted leave to present evidence in support of various claims, as set out in existing pleadings, in the ET1 and/or the list of issues and/or the Scott Schedule, but only as from 1 December 2012. That reference to 1 December 2012 must be wrong. It must have been intended to be 1 December 2010.

The bias appeal

28. I turn now to the bias appeal. That is an appeal against the first judgment and the Reasons given separately for that judgment. The grounds were, first, that the Employment Tribunal Judge, having announced his decision on 6 December 2012 at the hearing, could not then re-hear the matter again on 19 June 2013. That, it is said, would give rise to a real appearance of bias. Secondly, it is also contended that the Judge dealt with the hearing on 19 June 2013 in a procedurally unfair way in that no opportunity was given for the Appellant to call witnesses and the Judge relied on case-law without mentioning that case-law and inviting submissions.

29. The starting point is the 6 December 2012 hearing and the decisions taken. The purpose of that hearing was to determine the question of whether or not the Claimant was disabled. The Tribunal heard evidence and submissions on that issue. It announced its conclusion on that issue at the end of the hearing. It found that the Claimant was disabled. That factual aspect of her claim was therefore resolved on that day, and would not, in normal circumstances, need to be reconsidered. It is clear from the Rules that reasons should have been given either orally on the day or in writing. They were not given orally on the day. It is not now possible for the

Reasons to be given in writing, as the Employment Judge has accepted that he is unable to recall the reasons.

30. By 19 June 2013 it had become clear to the Employment Judge that he would have to conduct some kind of re-hearing on the question of whether or not the Claimant was disabled. Pausing there, it is difficult, in my judgment, to see how a reconsideration of that issue could have formed the subject matter of a review under rule 34 of the Tribunal Procedure Rules. None of the bases on which a review may be allowed appear to contemplate a re-hearing of a decision on a particular issue.

31. The Employment Judge did, however, conduct a re-hearing on 19 June 2013. He heard the Claimant's evidence again. He heard submissions. He considered all the relevant documentary evidence. In my judgment, the substance of what happened is clear. On 19 June 2013 the Employment Tribunal was carrying out a second hearing on the question of whether or not the Claimant was disabled: that is, he was considering and deciding again the very issue that he had first determined in December 2012. The Employment Judge stated that he was treating the case as one where he was reviewing the 6 December 2012 decision. In those circumstances, in my judgment, the only real course open to the Judge on 19 June 2013 would be to revoke the 6 December 2012 decision and to start again. A decision had been given. The Reasons for that decision were not known, and the Employment Judge could now no longer supply them. The only feasible course of action was to start afresh and decide again whether or not the Claimant was disabled. The basis for review would, in the unusual circumstances of this case, be that in rule 34(3)(e), the interests of justice. Given that no reasons could now be given for the 6 December 2012 decision, the decision would have to be revoked in the interests of justice, and the matter reconsidered. The question then would be,

would it give rise to an appearance of bias if the Employment Judge conducted the substantive re-hearing?

32. I turn, therefore, to that important question: that is, whether this Employment Judge could himself, as he purported to do, re-hear the issue on 19 June 2013 as to whether the Claimant was disabled or whether it would give rise to an appearance of bias if he himself carried out that re-hearing. The relevant test is set out in paragraph 103 of **Porter v Magill** [2002] 2 AC 357:

> **"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."**

33. I remind myself of the observations in **Lawal v Northern Spirit Ltd** [2003] ICR 856 at paragraph 14 that one must remember that a reasonable member of the public is neither complacent nor unduly sensitive or suspicious. In my judgment, on the particular and unusual circumstances of this case, there are two factors that are particularly relevant to the question of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias if Employment Judge Milton conducted the re-hearing.

34. First, that Judge had already reached a conclusion on the very issue that was to be considered at the re-hearing. The issue was, was the Claimant disabled? The Employment Judge had reached a conclusion, having heard evidence and submissions at the hearing on 6 December 2012. That is clear from paragraph 5 of his written Reasons for the first judgment following the Pre-Hearing Review in June 2013. At paragraph 5 he says:

> **"....I had in my mind reached a firm conclusion that I was persuaded that the Claimant had a physical impairment because of her back condition which had lasted for at least a year..."**

35. That refers to the conclusion he had reached on 6 December 2012. He describes is a "conclusion". It is not expressed as a view. He describes it as "firm". It is not expressed to be provisional. Reading paragraph 5, that leaves the impression that the Judge had already decided firmly the issue that he was about to consider at the 19 June 2013 hearing.

36. The second important factor is this. At paragraph 13 the Judge said that he would not recuse himself. He said this was not a case where he had given an indication. He appears to accept that, if he had given an indication, it would not be appropriate for him to sit at the hearing on 19 June 2013. But he had done more than given an indication. He had already reached a firm conclusion on 6 December 2012 and had announced that conclusion.

37. In addition, I note for completeness the Employment Judge's reasoning that he did not accept that this was a case where the doctrine that justice must be seen to be done was applicable. As an Employment Judge sitting on a case where it is necessary to decide whether or not a person is disabled and can make a claim on that basis, that doctrine does apply. The common law principles of fairness require that a Tribunal be impartial. They require that there must be no appearance of bias. Those principles do apply to Employment Judges sitting in Employment Tribunals.

38. Against those factors, I have considered the submissions of Ms Idelbi on the case-law and, in particular, on the cases of **Mahomed v Morris** in an unreported judgment of 3 February 2000 and **Sengupta v Holmes** [2002] EWCA Civ 1104. Both cases involved very different facts and a very different situation from the present case. **Mahomed** dealt with the refusal on the papers of permission to appeal to the Court of Appeal. The Judge who refused permission on the papers then heard an oral application for permission. The Court of Appeal

concluded that no fair-minded observer would have considered that the limited consideration of whether to grant permission on the papers would prevent a Judge from considering the matter afresh with the benefit of oral argument at the hearing. In those circumstances, the Court of Appeal decided that there was no bias and no appearance of bias.

39. Here, by contrast, the Employment Judge decided a factual issue on 6 December 2012. He then purported to have a hearing to decide the very same factual issue for a second time on 19 June 2013. That, in my judgment, gives to very different considerations from the considerations that arose in the **Mahomed** decision.

40. Dealing with **Sengupta**, in that case Laws LJ refused permission to appeal on the papers. Permission was granted by another court after an oral hearing. Laws LJ sat on the substantive appeal and the question was whether or not the presence of a Judge on the substantive appeal who had refused permission on the papers gave rise to the appearance of bias.

41. The Court of Appeal contrasted the situation where a Judge had actually ruled on the substantive issues in the case and then sat on the appeal with a situation where permission to appeal had been refused, and then the Judge who had refused permission on the papers subsequently considered the appeal itself, a differently constituted court having in the interim granted permission. The first situation is dealt with in paragraphs 31 and 32 of the judgment:

> **"31. Such an apprehension of a closed mind on the judge's part will only arise in reality where it is said that he has *pre-judged* the issue, and in consequence it is reasonably feared that he cannot or will not revisit the issue with an open mind.**
>
> ***(4) When Such Apparent Bias is Justifiably Apprehended***
>
> **32. I accept that there will be some circumstances where such a fear would certainly be reasonable. If a judge has presided at a first instance trial and roundly concluded on the facts – after hearing disputed, perhaps hotly disputed, evidence – that one of the parties lacks all merit, everyone would accept that it would be unthinkable that he should sit on that party's appeal. He has committed himself to a view of the facts which he himself had the responsibility to decide."**

42. The Court of Appeal contrasted that position with a refusal of permission by a Judge who then participated on the substantive appeal. And at paragraph 35 the court said this:

> **"But the ordinary case is far from those instances. It is of the kind that has happened here: the judge in question has not himself had to resolve the case's factual merits, and has not expressed himself incontinently. All he has done is to conclude on the material before him that the result arrived at in the court below was correct. And he has done so in the knowledge that, at the option of the applicant, his view may be reconsidered at an oral hearing. In such a case is there a reasonable basis for supposing that he may not bring an open mind to bear on the substantive appeal if, after permission granted by another judge, he is a member of the court constituted to deal with it?"**

43. The court concludes that the answer to that was no, there was no reasonable basis for considering that there would be a risk of bias.

44. The present case, in my judgment, falls within the first category of cases described by the Court of Appeal in **Sengupta**. The Employment Judge here has heard the substantive case once. He has reached a view on the factual issues that arises. He cannot remember the reasons why he came to that view, and there therefore has to be a re-hearing. But on the re-hearing, he is considering the very substantive issues that he has already ruled upon. It is, in my judgment, akin to the situation envisaged in paragraph 32 of **Sengupta**, where there would be a reasonable apprehension of bias. **Sengupta** is certainly not authority for the converse proposition, namely that there would be no reasonable apprehension of bias in a case such as the present. **Sengupta** dealt only with the situation where the Judge refused permission to appeal and subsequently sat on the substantive appeal after another court had granted permission. In that situation there would not be an appearance of bias. But that situation is very different from the present where the Judge deals with, and is responsible for deciding the facts at one hearing. That issue has to be re-opened and the facts reconsidered at a later hearing, and the same Judge considers those facts at that later hearing.

45. Ms Idelbi also reminded me of the presumption that Judges are presumed not to be biased. I accept that such a presumption exists. But the question here is whether, on the facts, a fair-minded observer would conclude that there is a real possibility that the Tribunal was biased. Ms Idelbi also reminds me that there are circumstances where a Tribunal will have to look again at its own decision, so one should not assume that is of itself objectionable. Ms Idelbi gave two examples. First, there would be the possibility of a review under rule 34 of the Procedure Rules. Secondly the case may be remitted by the Employment Appeal Tribunal to the Tribunal that decided it.

46. Both of those are correct. But the circumstances in which review and remission occur are different.

47. In the case of review, that may occur, in the limited circumstances set out in rule 34(3). It has to be a case where the decision was wrongly made as a result of administrative error or the party did not receive notice of the proceedings or the decision was made in the absence of a party, or there was no evidence or the interests of justice required such a review. One can readily understand why, when a Tribunal is dealing with those very specific situations, there would be no bias in it considering the review of its earlier decision.

48. In the case of remission, the Employment Appeal Tribunal would have decided the law. The Tribunal can be trusted to apply the correct law to the facts that it has found. Mr Rajgopaul also reminded me of the decision in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, where the court observed that remission is not automatically to the same Tribunal and it would

not be sent back to the same Tribunal, for example, if there was a risk of pre-judgment or partiality or other circumstances.

49. This case is very different from all the cases that I have referred to. The Employment Judge here has decided a particular issue. He heard evidence and submissions on 6 December 2012 and decided the Claimant was disabled. That decision cannot stand because no reasons were given for it. The Employment Judge correctly recognised that the whole matter would have to be re-heard. However, he then purported to decide the very same issue himself. He again heard the evidence of the Claimant and her written submissions. In my judgment, a fair-minded observer, having considered the facts, would think there was a real possibility of bias in the present case. The fair-minded observer would think there was a real possibility that the Employment Judge would automatically come to the same view on the second hearing of the issue that he had come to on the first hearing of the issue.

50. For all those reasons, on the unusual facts of the case, there was an appearance of bias on the part of Employment Judge Milton when he dealt for the second time with the substantive question of whether the Claimant was disabled on 19 June 2013.

51. For those reasons, the appeal on the ground of the appearance of bias will be allowed. In those circumstances, the Employment Judge should not have re-heard the question of whether or not the Claimant was disabled. By the same reasoning he should not have dealt with the question of whether or not an extension of time should be granted for other claims relating to the disability or questions of whether or not amendments were necessary. In the circumstances, it is not necessary to reach a view on the other complaints of unfairness about the conduct of the hearing on 19 June 2013. It also means there is no need for a separate consideration of the

question of the amendment issues appeal. Both parties agree that if there was an appearance of bias, the Employment Judge should not have dealt with the amendment issues either.

52. I therefore allow the appeal against the two judgments of the Employment Tribunal following a Pre-Hearing Review on 19 June 2013. For the avoidance of doubt, those are the judgment dated 3 July 2013 and the three paragraphs of the judgment and the interlocutory order, and the judgment dated 27 September 2013 and the first two paragraphs of that order.

Conclusion

53. In my judgment the proper approach to this matter is as follows. In relation to the first judgment, the Employment Judge was wrong to refuse the application to revoke the decision of December 2012. Given that no reasons have been given and could not now be given, the Employment Judge should have acceded to the request to revoke the 6 December 2012 decision. It was irrational, having recognised the need for a fresh hearing to deal with the substantive issues, to allow the original decision to stand. Having allowed the appeal against the decision in the first judgment on 19 June 2013, I will therefore also revoke the 6 December 2012 decision pursuant to the powers conferred on me by section 35 of the **Employment Tribunals Act 1996**.

54. The question arose at this hearing as to whether the 6 December 2012 decision was a nullity and could not be reviewed. Reference was made to the decision in **Guest v Alpine Soft Drinks Ltd** [1982] ICR 110. The rule there was differently worded to the present Rules and said that the decision of a Tribunal shall be recorded in a document signed by the chairman which should contain the Reasons for the decision. The court there held that, in the absence of a document containing the Reasons, the decision was a nullity.

55. In my judgment, the position is different under the current rules. Here there was a valid decision given on 6 December 2012. Reasons could either be given on 6 December 2012 or later in writing. The decision itself was not necessarily a nullity because of a lack of reasons. The decision could be the subject of a review. If it were not possible to give reasons, that may well be a reason for revoking the decision on the grounds of the interests of justice. Alternatively, there could be an appeal to the EAT on the grounds that there had been a failure to give reasons, as a required by rule 30. The fact that reasons had not been given and could not be given may be a reason for allowing the appeal. That, in my judgment, was the appropriate way in which the matters could have been dealt with.

56. As the 6 December 2012 decision is revoked and as all the decisions taken at the 19 June 2013 hearing are also to be set aside, I will remit to a differently constituted Employment Tribunal the question set out in the order of the case management discussion of 18 September 2012. They are the two questions set out at paragraph 4 of that order.

57. A question has arisen as to whether or not the order of 21 February 2013 should also be set aside. That was an order made by the Employment Judge requiring the Claimant to provide a Scott Schedule. He had first made such an order on 6 December 2012. Because it was not written down, it was not complied with. So he re-issued it. It seems to me that that order too ought to be revoked. First, it is an order that was issued as a consequence of the decision on 6 December 2012. As I am revoking the decision of 6 December 2012, in my judgment, I should also revoke the consequential order of 21 February 2013. Secondly, and separately, reasons have been requested for the various orders that Employment Judge Milton gave

following the December 2012 review. No reasons have ever been given for the 21 February 2013 order, and that in itself justifies revoking the 21 February 2013 order.

58. There will be no prejudice to the Claimant. She has prepared a list of the legal claims she wishes to bring. Ms Idelbi accepts that there will be a need at some stage to have a Tribunal decide whether or they constitute amendments and, if they do, whether permission should be granted. The Claimant therefore will not be at a disadvantage because of the formal revocation of the order of 21 February 2013.