Appeal No. UKEAT/0155/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 March 2014

Before

HER HONOUR JUDGE EADY QC

PROFESSOR K C MOHANTY JP

MR S YEBOAH

PROFESSOR C D FRASER — APPELLANT

UNIVERSITY OF LEICESTER & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

JUDGMENT ON RECUSAL APPLICATION

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Direct Public Access Scheme
For the Respondent	MR TIMOTHY PITT-PAYNE (One of Her Majesty's Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

Application for recusal on basis of past professional relationship and previous instructions in race discrimination case for another University. Risk of unconscious bias alleged.

Rejected on basis that the properly informed, reasonable observer would not perceive there to be any risk of unconscious bias.

HER HONOUR JUDGE EADY QC

Introduction

1. This is our unanimous judgment on a preliminary application made at the outset of the hearing in this appeal, that I should recuse myself from hearing this matter. In giving this judgment, we refer to the parties as the Claimant and the Respondent as before the Employment Tribunal below.

2. By way of background, on 3 March 2014, Eversheds Solicitors – who act for the Respondents, the University of Leicester and others - wrote to the Claimant, copied into his counsel (who is instructed on a direct access basis), drawing his attention to the fact that, as was apparent from the EAT cause list on its website, this matter was listed to be heard in front of me, sitting with two lay members, and drawing the Claimant's attention to the following facts:

> **"Prior to her appointment to the EAT in November 2013 HHJ Eady QC was a member of Old Square Chambers where Jane McNeill QC who chaired the university's grievance panel in your case was joint head of chambers...we do not object to HHJ Eady QC sitting in this case and nor do we suggest that there was any reason why she should not sit. In particular we note that although before the Employment Tribunal you made allegations of discrimination and victimisation against Jane McNeill QC you are not appealing against the Employment Tribunal's decision in respect of those allegations."**

3. The listing of this matter would have been ascertainable about a week before the hearing, which is when the listing goes up on the website. In any event on 4 March 2013 Professor Fraser wrote to the EAT in the following terms:

> **"I discovered that HHJ Eady QC has been chosen to sit in the EAT hearing in this case. I wish to object to HHJ Eady QC sitting as the EAT Judge. I do so on the principal basis that I do not believe or think that there can be a fair hearing when the EAT judge belongs to the same Chambers, Old Square Chambers, as Ms McNeill QC, joint head of chambers, whose grievance committee report dismissed my race discrimination complaint against the Respondent. Justice cannot be seen to be done in such circumstances and I would urge the EAT to allocate another Judge for the hearing."**

4. Professor Fraser's communication was put in front of me yesterday, and I directed that a response should be given in the following terms:

> **"The Appellant's letter and application of 4 March 2014 has been referred to HHJ Eady QC, who is currently listed, along with two lay members, to hear this appeal on 5 and 6 March 2014. Having considered the content of the appellant's letter and having also seen the prior letter from Eversheds for the Respondents of 3 March 2014 HHJ Eady QC observes that she ceased to be a member of the Bar and of Old Square Chambers when she took up her present full-time appointment as a Judge on 2 December 2013. She currently sees no basis for recusing herself from hearing this appeal. Should either party wish to make any further application in this regard, this should be done at the outset of the hearing due to commence 5 March 2014."**

5. A further letter was received from the Claimant, later on 4 March 2014, effectively repeating his application that I should recuse myself from hearing this appeal and observing as follows:

> **"I do not believe that an impartial observer would believe that HHJ Eady QC's resignation from Old Square in December 2013 would make her more likely to come to a different conclusion from Ms McNeill. I also believe the fact I did not choose to appeal the EAT's finding that Ms McNeill's committee did not victimise me for my race discrimination complaint has no bearing on this likelihood."**

6. He went on to add:

> **"Another reason why I believe that HHJ Eady should recuse from this case is her recent links with Eversheds, who were the instructing solicitors in the ET hearing and are the instructing solicitors in this hearing in cases similar to mine. This link is exemplified by Eversheds acting her to act for the University of Brunel as prosecuting Counsel in the grievances and disciplinary of Professor Ozegi in August 2013 in a matter that is going. Prof Ozegi has been dismissed for gross misconduct for persisting in asking for an apology and an inquiry into seven cases of victimisation by senior officers of Brunel against black and minority staff (BAME) including himself proven at the ET. I believe that an impartial observer, in possession of all the facts, will find it a remarkable coincidence that HHJ Eady QC, a judge with such close recent direct and direct links to race discrimination and victimisation grievances by two BAME professors is nonetheless allocated to the EAT hearing of one of them when there are many EAT judges."**

7. The EAT responded to that letter simply by inviting any such request to be made at the outset of the hearing.

8. At the outset of this appeal hearing, counsel on behalf of the Claimant made that application on his behalf. The grounds were effectively those rehearsed in the second letter of 4 March, with slight adjustments to the way in which the submissions were put.

Oral submissions

9. On the professional relationship with Ms McNeill QC, it was observed that, as I had been a recent member of the Chambers where Ms McNeill is a Joint Head of Chambers, and as Ms McNeill was somebody against whom allegations of race discrimination had been made in the Employment Tribunal proceedings, there was a danger that there might be unconscious bias on my part to effectively seek to uphold or replicate the findings that Ms McNeill made in her grievance committee function. It was submitted that the Employment Tribunal had been influenced by the findings of Ms McNeill's committee: a lot of their findings mirrored what she had found, as set out in her report. Given that this appeal involves a challenge to the Employment Tribunal's findings, it was contended that I might, in turn, be unconsciously prejudiced because of that background involvement of Ms McNeill.

10. The second point also relied on the recent timing of my appointment to the EAT. It was observed that I had had professional involvement in what was described as a similar case, in which I had been instructed by Eversheds to act for a respondent University, and it was submitted that this meant that there could be a real danger of unconscious bias. Reliance was placed on the case of **Locabail v Bayfield Properties** [2000] IRLR 96 and the examples given in that case. We were also referred to **Peninsula Business Services v Rees and others** UKEAT/0407/10, which involved a part-time Employment Judge, who was also a practising member of a firm of solicitors offering competing services to Peninsula, one of the parties in the case. The Employment Judge had made comments critical of Peninsula, and it was seen that there could be a perception that she had been biased in the hearing of that case.

11. In response, Mr Pitt-Payne QC for the Respondents opposes the application. On the first issue – relating to the professional relationship with Ms McNeill – he observed that this might

have been a professional relationship when I was a member of the Bar practising from Old Square Chambers, but this was not an uncommon situation arising both for full-time Judges and part-times Judges, particularly in specialist jurisdictions where they may be judging cases involving members of their own chambers as advocates. That being so, there was no special reason in this case why I should recuse myself. Secondly, in relation to the previous instructions from Eversheds, the submission was made that, as I am no longer in practice, I can have no possible interest in any future instructions from that firm and that, again, it would not be unusual for judges to hear cases involving bodies where they had previously been instructed to act for not dissimilar organisations and may involve firms of solicitors by whom they had been instructed. Again, that gave rise to no ground for me to recuse myself.

The law

12. In hearing a case where a question has been raised of a possible perception of bias, the test is that laid down by the House of Lords in **Porter v Magill** [2002] 2 AC 357. That is, whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

13. In considering that question, we have had regard to the various examples in the well-known case of **Locabail**. We note that, in the normal course of events, it was observed that an objection could not properly be made on the basis of, for example, a Judge's previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him or membership of the same Inn, circuit, local law society, or chambers. In the normal course of events, one would need to see something more than that arising in order to give rise to the well-informed reasonable observer concluding that there was a danger of bias.

Discussion and conclusions

14. Having taken time to consider this application as a panel, we formed the unanimous view that it would be wrong for me to recuse myself from hearing this appeal.

15. It is a Judge's duty to hear such cases as are assigned to her, unless there are proper grounds on which she should not do so. Where those grounds are demonstrated or become apparent, it is equally the Judge's duty to cease to hear the case. And that must be the case even if such a course would give rise to delay or other expense or inconvenience.

16. In the present case, the factual circumstances are not in dispute and have been set out at an earlier stage in these reasons. In respect of my past professional involvement with Old Square Chambers where Ms McNeill QC was and remains a Joint Head of Chambers, I was neither an employee nor in partnership with Ms McNeill. I practised as an independent member of the Bar and would take instructions as such, even if that meant taking instructions to appear against other advocates in those chambers, including Ms McNeill. In any event, I ceased to be a member of Old Square Chambers when I ceased to be a member of the Bar on taking up my judicial appointment as from 2 December 2013. The key point is not the timing of that - whether it was recent or not - it was the taking up of the appointment and, more significantly, the taking of the judicial oath. At that stage, any past professional involvement I might have with Old Square Chambers ceased to be a consideration even if (which we doubt) it had been a factor before.

17. In particular, where there is in existence a specialist court or Tribunal such as the Employment Appeal Tribunal, it will be not uncommon for the specialist Judges who sit here to have had past professional dealing with those appearing before them or indeed those whose judgments they have to consider. It is, for example, not uncommon for allegations to be made

of unfair hearing or other procedural impropriety relating to an Employment Tribunal presided over by an Employment Judge who judicial members of this court may know professionally, perhaps because of past professional relationships or simply because they have come across that individual on training exercises or in other contexts of a professional nature. It would be difficult for this court to function if Judges practising in this specialist area could not carry out their judicial function because they had some past professional dealings with those whose names appear in some of the cases before them.

18. This is not a case where Ms McNeill QC appears as a witness before us or, indeed, was a party to these proceedings. Moreover, none of the allegations relating to Ms McNeill's involvement in this matter actually form part of the grounds of appeal that are before us, albeit that we were far from convinced that it would have made any difference if they had been. This is a case where we are concerned with the Employment Tribunal's findings, and those findings are based on its hearing of evidence over 19 days. We will judge those findings as they arise and as we see them on the submissions made before us. Any past professional conduct with Ms McNeill QC is not a matter which, in our judgement, a properly informed, reasonable fair-minded observer would then conclude gave rise to any perception of bias.

19. As for the second point, it is right to say that in the last year of my practice at the Bar I was instructed by the Cambridge office of Eversheds Solicitors to act in an Employment Tribunal hearing to represent the University of Brunel in a case brought by a Professor relating to claims of race discrimination that he had made. It is also right to observe that during my practice at the Bar I acted for numerous parties and firms of solicitors, both claimants and respondents, in cases involving complaints of race and other forms of unlawful discrimination. The objection made, it was stressed, related to the fact that the instructions were so recent and the fact that it was a similar case. Again, we do not accept the timing point. The

key factor seemed to us is that I now sit full-time in a judicial capacity. I can have no interest in any future instructions or any other relationship with Eversheds or any other firm of solicitors. I am duty bound to determine cases in accordance with that oath and have no regard whatever to past cases in which I had an involvement as an advocate during my time at the Bar. Again, we do not consider that a properly informed, reasonable fair-minded observer would conclude that past receipt of professional instructions in other discrimination cases in the higher education sector would give rise to any perception of bias on the part of a judicial member of a specialist employment appeal tribunal.

20. For those reasons, we reject this application.