Appeal No. UKEAT/0518/13/LA
UKEAT/0519/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS L ELYS — APPELLANT

(1) MARKS AND SPENCER PLC
(2) MISS GWEN MCKEOWN
(3) MISS AMANDA MELLOR — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS LAYCY ELYS (The Appellant in Person)
For the Respondent	MR PAUL NICHOLLS QC (One of Her Majesty's Counsel) Instructed by: Marks & Spencer PLC Legal Services Waterside House 35 North Wharf Road London W2 1NW

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

PRACTICE AND PROCEDURE - Review

The Claimant appealed a determination against her on liability, and refusal subsequently to review that decision. In part, this was because she said a lay member had been asleep through parts of the evidence. The ET decided it should determine at the review, as a whole panel, whether there had been a material procedural irregularity. It concluded that the member had his eyes closed for periods of time, and on one occasion had been seen by the Judge to be drooling, so as to require to be nudged. Nonetheless it held that there had been no procedural irregularity. On appeal, it was held (contrary to the Respondent's primary submission that the ET decision should stand unless it could be shown that there was an error of law) that it was not appropriate for the ET to take a decision whether it had itself been innocent of procedural irregularity, though if it decided it had, that decision could be acted upon, and if not, the comments of the Judge and Members as to what had happened would be of importance. It was for the EAT to judge as a primary fact finder whether there had been an irregularity such as vitiated the hearing, and to assess the evidence thus established by asking whether the well-informed objective observer would think there was a real possibility that there had been a material procedural irregularity (considering **Stansbury v Datapulse**). Having considered the material put before it, the ET concluded that it would have appeared to such an observer, once he knew of the explanation, that the member had shut his eyes because he suffered from dry eye syndrome, and had not been guilty of inattention save for one short episode (on the evidence of some 10 -15 seconds duration) when he had been nudged and had thereafter clearly been alert. This was regrettable, but on its own of trivial significance, and did not appoint to a material procedural irregularity.

Observations made as to the duties of lay members of tribunals who might suffer from conditions which if unexplained in advance might give rise to a suspicion that they were not paying full attention to proceedings.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against two decisions made by an Employment Tribunal at Watford (Employment Judge Bedeau, Mr Lowndes, and a Ms Hamill). For reasons given on 25 April 2013, the Tribunal first dismissed all the complaints which the Claimant had made arising out of her employment and listed a costs application to be heard later. The Claimant, who had appeared to represent herself before the Tribunal, sought a review on that decision on a number of grounds. That review was held and refused for Reasons given on 22 August 2013.

2. One point, however, emerges from the liability hearing and the review, which it is said means that neither decision can properly stand. That is the claim that one of the members of the Tribunal, Mr Lowndes, had openly slept for periods during the liability hearing. As it was put by the Tribunal in its review decision, in a number of paragraphs dedicated to Mr Lowndes, the allegation was that he appeared to be asleep during the cross-examination by the Claimant of the Respondent's witnesses.

3. It identified the first problem it had to face:

> **"Here the procedure the tribunal should follow has not been clearly defined. It was felt that the tribunal should explore the matter rather than referring it to a differently constituted tribunal for evidence to be given. We invited the parties to give their accounts of what they observed of Mr Lowndes during the hearing and for the Tribunal members to do the same."**

4. The case of the Claimant, on one view, was a powerful one. She said that Mr Lowndes had appeared to her on a number of occasions during the liability hearing to have his eyes closed. She thought him to be asleep. There were two other particular matters upon which she relied. The first of these was that it was revealed by the Tribunal (and indeed the Claimant had noticed) that, on one occasion, not only were his eyes closed but he appeared to be drooling and

did not wake until the Judge nudged him. This incident lasted some 15 to 20 seconds. Second, when she was cross-examining one of the several witnesses called for the Respondents, Mr Lowndes had turned his chair so that to some extent his back was towards the witness and he was looking out of the window.

5. The observations that the Claimant made were not unfounded. The strength of her case arises because, in its material respects, her allegation was supported by counsel who had appeared for the Respondents, who told the Tribunal that she had observed that Mr Lowndes had his eyes "closed a lot", though she ventured the opinion that he was not asleep. The Judge himself had noticed that from time to time Mr Lowndes had his eyes closed. He noticed, of course, the incident in which he had nudged Mr Lowndes when he saw him drooling, commenting that thereafter he remained alert, with his eyes opened.

6. The Tribunal nonetheless felt able to come to a view that there had been no such procedural irregularity before it as would permit it to grant the review. This is because three reasons explained what had been observed. Paragraph 31:

> **"Mr Lowndes said that he has a medical problem in relation to his eyes as he suffers from a condition called 'dry eyes' for which he takes medication called Liquifilm. He is required to close his eyes to prevent them from drying out and to artificially hydrate them. It might appear to others that he was sleeping and not paying attention, but when his eyes were closed he was listening to the evidence. He said that his notes covering the evidence runs [sic] into several pages and he was fully attentive. He stated that one occasion, as part of his treatment for a serious medical condition, he inadvertently took the wrong painkillers on 20 February 2013. This caused him to have a spasm for a few seconds. He said on that occasion he did not fall asleep. In relation to re-positioning his chair, he said that his seat was immediately below the air conditioning vent. As it was blowing cold air he turned his head to face the window to avoid the draught. He had been sitting as a Tribunal member for 25 years.**
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> **32. After the parties had left and during our discussion he said that he is colour blind, a condition diagnosed from birth. He was taking Tamsulosin Hydrochloride 400mg tablets twice a day to avoid any blockages in his bladder. He was also taking Tramadol 500mg capsules as a painkiller for his major medical condition four times daily. We noted that both tablets are coloured yellow and green. On 20 February 2013, he mistakenly took the wrong tablet causing him to be momentarily inattentive for between 15 to 20 seconds."**

7. It was common ground before me that there is no authority which has previously examined what a Tribunal should do when challenged in the course of a review application in respect of its conduct during an earlier hearing an earlier. It took the view as set out at paragraph 3 above.

8. Before me the Respondents, represented by Mr Nicholls QC, who did not appear below, submitted that I should treat the facts as established by the Tribunal. It was not, he submitted, the proper function of this Tribunal to find the facts for itself. Having accepted the facts as found by the Tribunal, he submitted, however, that I was not obliged to ask whether the analysis of those facts was one which the Tribunal was entitled to make without error of law but, rather, that I should decide for myself whether what had happened amounted to a fair hearing or not. Though accepting loyally the facts as found by the Tribunal, the Appeal Tribunal should analyse those facts for itself, asking the overall question: did the Tribunal err in concluding that the decision was fair?

9. I do not accept that that is the proper approach. In my view I should approach the facts and submissions here in three stages. First, I should consider the proper approach to be taken by the Appeal Tribunal. Second, depending on my decision as to which is the correct approach, either accept the facts as found by the Tribunal or separately determine them. Thirdly, analyse those facts in accordance with the authorities. If a conclusion needs to be made about the behaviour of a member of the Tribunal or about what occurred, I accept that I should assess that on the balance of probabilities, taking into account all the relevant circumstances, and, insofar as it is proper to do so (about which I shall comment later), those matters which cannot be established but are regarded as matters of real possibility.

The approach

10. Cases in which a judge or Tribunal member has been said to be inattentive have been relatively rare. There is one Court of Appeal decision: that of **Stansbury v Datapulse plc** [2004] IRLR 466, [2003] EWCA Civ 1951. In that case the Court allowed an appeal from a decision of the Appeal Tribunal, which had held that, on the assumption that a member of the Employment Tribunal which dismissed the applicant's case had consumed alcohol and fallen asleep during the hearing, the hearing was nevertheless fair and complied with Article 6 of the European Convention on Human Rights so that it was not in the interests of justice for it to be re-heard. The reasoning was in part this:

> **"If the EAT entertains a complaint, what then is their function? Contrary to the view of the EAT in this case, and with all respect to them, it seems to me plain that the EAT may have to assume the role of judges of fact in relation to a complaint about the behaviour of a member of the ET, and that, if there are factual disputes relating to the complaint, the EAT may have to resolve them. That was plainly the view of the EAT in *Facey v Midas Retail Security* [2000] IRLR 813. In that case the EAT, the then President Lindsay J presiding, were concerned as to the procedures which the EAT should adopt to deal with allegations of misconduct, bias or procedural impropriety at the ET. In the particular case the allegations of bias and prejudice raised contested views of primary fact. Lindsay J recognised that it was for the EAT hearing the appeal in which the allegations were made to determine that issue, and he gave detailed guidance as to what the EAT should do in such circumstances. This included, if necessary, requiring the attendance at the EAT, for cross-examination, of witnesses as to the contested facts: see page 819 paragraph 39. On this I respectfully agree with the EAT in *Facey*. It is not, of course, necessary in every case to decide the question of fact..."**

11. Appeals from decisions of Tribunals arise on a point of law and a point of law only. But there is an error of law if there has been a material procedural irregularity before a Tribunal or bias within it. This requires primary facts to be found. Here, the Employment Tribunal is in a very different position from that which it occupies in the usual run of cases. In that usual run, the Tribunal will be determining the facts relevant to the complaint brought before it on the evidence of witnesses. It will do so, it is to be assumed, professionally and impartially and on the basis of the evidence of others called before it. However, when the Tribunal is concerned with allegations that it, the Tribunal or a member of it, has been biased or there has been a material procedural irregularity because of the conduct which it has permitted or, more

particularly, of which a member of it is guilty, the Tribunal is no longer concerned with facts relating to the conduct of others. It is, in effect, assessing its own conduct.

12. It is this consideration which leads me to think that if there is a proper case, and I emphasise those words, that there may have been bias or an appearance of bias or *a material* procedural irregularity, the Tribunal might be thought to be judge and jury in its own case if it were the sole arbiter of fact. Since what underpins the principles in respect of bias and appearance of bias as they have developed (see, in particular, **Porter v Magill** [2002] AC 357) is the principle that justice should be apparent and transparent, and that strenuous efforts must be taken to ensure that justice does not forfeit the respect to which it is entitled, it would seem to me to run the risk that an observer, viewing a Tribunal reaching a conclusive determination of the facts, in what is in one sense its own case, might think that justice had not been seen to be done impartially and objectively.

13. In the course of argument, I floated to Mr Nicholls whether this was similar to the position of a Tribunal invited to recuse itself for bias. He thought this a powerful analogy, supportive of the position which he adopted. When applications are made to a panel or judge that they should treat themselves or himself as disqualified, since their behaviour is such that it might be thought that their objectivity might be compromised, it is well accepted (see **Locabail v Bayfield Properties** [2000] IRLR 96) that they should neither too easily reject an application for recusal nor too easily accede to it. The tribunal judging its own procedural failings is in the position of having to judge a similar application, not least because if it took the view that the decision was for someone else, it would permit a litigant to choose his own Tribunal if determined to do so to and that could not serve the purposes of justice. The position, as it seems to me, is rather different after a hearing has been held. The Tribunal here

was invited to review its decision. It was, I think, a matter of importance and propriety that the Tribunal should set out what it saw as the facts so that the parties were aware of its view and could make such submissions as they wished with the fullest of information proper to the point. It was important that the Tribunal itself should ensure that all the available evidence, so far as it seemed to it, was garnered. For the purposes of the review hearing, it was also necessary for the Tribunal to decide whether the defects identified to it satisfied the Tribunal that there had not been a fair hearing. It is a matter of integrity for the Tribunal to say so if it did not think there had been. But the converse does not follow. A Tribunal's conclusion that there had been a fair hearing and that all the relevant facts had been stated to it, does not seem to me to prove that that is so. It all depends upon the scope of the enquiry. In this particular case, for instance, no-one has suggested that there was some material witness available who might have given evidence who did not do so. But there may well be a case in which that is so or there is a basis for seeking further relevant information – here Mr Lowndes said he suffered from a medical condition for which he was taking medication and Miss Elys wished to consider information about both the condition and the medication.

14. Accordingly it seems to me that the right approach is for the Tribunal to say, as it has done for present purposes, what its conclusion is as to whether the irregularity has occurred. That may well be sufficient for the party raising a question as to what had happened, and as to the way it appeared to her, to be satisfied with the answer. Often, a party will have a perception that the procedure adopted has been irregular or that the way in which matters have occurred has been unfairly prejudicial to her or him. That may well be a misconception. Particularly where litigants in person are concerned, unfamiliarity with the law can lead to misconceptions quite easily. Where a Tribunal takes time clearly to examine the material and put it before the parties that should in such a case be capable of satisfying the litigant that

despite first appearances everything has in fact been conducted properly, if it has, thereby ensuring that there is no need for a further appeal. But if there is a further appeal, because the litigant is not satisfied, it seems to me the appropriate course is for the Appeal Tribunal to treat the allegations in respect of the earlier hearing (not directly in respect of the review) to be examined as an appeal against that earlier hearing, to be approached in exactly the same way as Lindsay J set out in the case of **Facey v Midas**, as endorsed in **Stansbury v Datapulse**, and as replicated now by the EAT Practice Direction of 2013. There, in paragraph 13, provisions are made in respect of an appellant who intends to complain about the conduct of the Employment Tribunal, for example in respect of bias, apparent bias or improper conduct, or material procedural irregularity at the hearing. Those provisions provide for evidence to be given. The evidence is given for this Tribunal to assess.

15. I do think that the system of justice should be content with a Tribunal accused of bias or irregularity being entitled to find the facts which relate to its own behaviour and for that to be conclusive. It may set out, exactly in the same way as the procedure provided for by paragraph 13 requires, its comments about what had been said. But it must be remembered that, particularly where the allegations focus upon the conduct of one of a Tribunal of three, that all are professionals, all are responsible, all have an obligation to be frank and full in what they say, and each is separately making a comment about what has happened. It is not, as I see it, part of the Tribunal's function to determine as a tribunal of three, jointly, whether what had happened at the earlier hearing was or was not a procedural irregularity, though, as I have said, in the interests of justice, should it conclude that it was, then the courts should have little hesitation in accepting that.

16. Taking that, therefore, as my approach, I turn to the question of the test which should be applied. In **Stansbury v Datapulse** the court was concerned with the attentiveness of one of the members of the Tribunal who had been drinking and was said, as a consequence, to have fallen asleep. It accepted earlier observations made in the case of **Kudrath v Ministry of Defense**, 26 April 1999 UKEAT 422_97_2604, (Morison J), that it was the duty of the Tribunal to be alert during the whole of the hearing. At paragraph 28 Peter Gibson LJ, with whose Judgment Latham LJ and Sir Martin Nourse agreed, said:

> **"It seems to me that an analogy with cases of bias is appropriate. In cases of bias the appearance of bias, as observed through the eyes and ears of a fair-minded and informed observer, will vitiate a hearing: see, for example, Porter v Magill [2002] AC 357 at 394 per Lord Hope. A member of a tribunal who does not appear to be alert to what is being said in the course of the hearing may cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights."**

He went on to quote from the European Court of Human Rights in **Kraska v Switzerland** [1993] 18 EHRR 188 at page 201 that

> **"The Court had already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified."**

17. The Court of Appeal there appeared to be adopting a test not only of actual inattention but of the appearance of inattention, albeit subject to the **Kraska** observation that the standpoint of the observer must be capable of being objectively justified. The equation of that approach with the one in bias leads me to adopt the test and approach, taken in that context, of asking not only if there had been actual inattention but if a well-informed and fair-minded observer would, or might well, consider that there had been. This test was one which Mr Nicholls thought entirely appropriate on the approach to the determination of facts which I was adopting. I do not think that Miss Elys disagreed with it, although she did not specifically advance it.

The facts

18. Taking that approach, then, to the analysis of the facts, I turn to what the facts were. I have set out some of them already. But these further facts also appear to me to arise, and I take into account here what the Tribunal has said, as if they were commenting in accordance with the Practice Direction paragraph 13, upon the observations contained in the affidavit of the Claimant. That affidavit recorded that she did not raise the matter of Mr Lowndes' sleeping during the hearing either with the Tribunal or with the counsel for the Respondent. She explained that she did not do that because she would not feel comfortable doing so. That seems to me entirely acceptable, and I note that in the case of **Kudrath** Morison J for the Appeal Tribunal said this:

> **"...whilst it is clearly preferable that the advocates, representatives or parties themselves should complain, at the time, that the Tribunal does not appear to be fully alert, in the context of litigation in the Employment Tribunals we regard it as unrealistic to expect that that will always be sensible or practicable. In the *Moringiello* case [that was a criminal case] there was a criminal trial before a Judge and jury. The jury are the fact finders. Both parties were represented by counsel at the hearing. It would have been possible, without difficulty, to make an application to the Judge, in the absence of the jury, about the Judge going to sleep, without fear that umbrage would or might be taken and the facts found against the complainant. In the Employment Tribunal, in many cases, one of the parties will be unrepresented by a lawyer. It would, we think, be a denial of justice were the EAT to refuse to intervene where a Chairman appeared to fall asleep, or was guilty of any other misconduct, if no complaint had been made at the time. There is an obvious distinction between the circumstances of the *Moringiello* case and what happens in Employment Tribunals. Whilst we would hope and expect that a professional advocate would raise the matter then and there, this expectation is not to be regarded as a pre-condition to making an appeal here on that ground. That said, when judging whether there has been an appearance of bias or impropriety, whether or not a contemporaneous complaint was made will be relevant."**

19. She said that Mr Lowndes appeared to be visibly asleep, unalert and unattentive at different periods and for different durations during the cross-examination of 13 witnesses over a three-week period. She thought the periods varied between five to ten minutes at any given time. She described what had happened on 23 May 2013 during the review hearing and noted in addition to the matters noted by the Tribunal itself that Ms Reindorf, counsel who had appeared for the Respondent below, said that she had observed the lay member with his eyes closed but always with a "pen in his hand". She commented that she thought the pen never

moved. She noted that not only was the explanation given as set out above but also that she was physically shown by Mr Lowndes in the Tribunal room a packet of eye drop solution with the detail “Allergan Liquifilm 0.4 ml”. There was no further particular of what had happened beyond the matters which were contained in the Tribunal decision itself. The further material, apart from the Tribunal’s decision, to which I shall return, was material which the Claimant had sought to put before the Appeal Tribunal in respect of the effects or possible effects of the medication which Mr Lowndes had been taking. An application to advance this was rejected by the Registrar on paper. There was an appeal under Rule 20 from a decision of the Registrar. The Claimant wished to raise the matter and did so at the start of this hearing.

20. Taking the view I had by then decided to adopt to the facts, it seemed to me I should not shut out any material which would assist me in determining what the facts were. That included medical material. I approach the medical material bearing in mind that it derives plainly from the internet, though from sources which seem relatively reputable, and may not be a complete recitation of all the medical knowledge that there is in respect of a particular product. I also take into account that medical datasheets drawing attention to potential side effects almost always state a very large range of side-effects, very few of which would in any individual case actually be suffered. That may demonstrate the extent of biological variability in response to particular drugs, but it is an accepted fact.

21. So far as concerns tamsulosin hydrochloride, the material provided to me shows more than 1% of people taking it may suffer a feeling of dizziness, as a common side effect, observing “If you feel dizzy, sit or lie down until you feel better”. There is no complaint other than that under the heading “Uncommon, rare, very rare” which might be relevant, as it seems to me, to the present case. But in a subsequent document, which does not come from the NHS

Choices website but from the drugs.com ("Know more. Be Sure") website, a wider range of tamsulosin side effects are stated. Under the heading "Some side effects may occur that usually do not need medical attention" and under the heading "Incidence not known" in a list which looks to be about 30 or 40 items long, drowsiness is mentioned, as is trouble concentrating. Tramadol, by contrast, is shown to be an opioid in a class which is in one site labelled a "strong opioid", in which class also are methadone and morphine. It is a painkiller. In the NHS Choices website, it notes that the medicine could affect ability to drive or operate machinery.

22. Apart from that material, the other facts which appear from the material before me suggest that, first, that counsel for the Respondent thought that Mr Lowndes was not asleep even though his eyes were closed. These words were added:

> **"He did ask of the witnesses questions. Some of the questions might have appeared to the Claimant unrelated to the issues."**

23. Miss Hamill, the other panel member, said that Mr Lowndes had asked questions of the witnesses and, in the Tribunal's discussions and decision-making, there was no indication at all that there were any gaps in his grasp or understanding of the details of the case. The Judge had noted from the fourth day of the hearing that Mr Lowndes would occasionally close his eyes but he "could not say that he was asleep". In a later paragraph he said there was just one occasion when he observed he appeared not to be attentive or alert. On that occasion he had nudged Mr Lowndes. Paragraph 34 noted that at that point thereafter he remained alert with his eyes opened. The Judge added:

> **"Having looked at Mr Lowndes' notes of the evidence, he had the relevant page numbers noted and the evidence given by the witnesses."**

The analysis of that factual material

24. The essence of the complaint is that there has been inattention. I must ask, first, whether I find as a fact, on the balance of probabilities, that Mr Lowndes was paying proper attention. If and to the extent that he did not pay proper attention, then if on that occasion it was truly to be said as trivial, there would not, in my view, be a material procedural irregularity.

25. I approach the matter, secondly, by asking, though I may have concluded that there was no improper inattention, whether a properly informed and impartial observer would think there was a real danger there had been inattention. But I must bear in mind that, in analysing that, I am not simply asking whether, as one normally would, of a case of someone whose eyes were closed whether that alone gave rise to an appearance that they might be sleeping. Plainly closing eyes more than momentarily it does give rise to that possibility, but if one knows why the eyes are closed and the explanation is both sufficient to explain what has happened and properly does so, then the well-informed observer, who would know of the explanation as well as the observation, would conclude objectively that there was no improper inattention.

26. Miss Ely argues that a Tribunal is under a duty to conduct a proper examination of the submissions, arguments and evidence. I agree. She relies upon the definition of sleep, the appearance of sleep and the character of sleep, to make the point that sleep can be defined (she referred to **Kudrath**, **Stansbury**, **Whitehart v Raymond Thompson Ltd** [1984] EAT 910/83, **Red Bank Manufacturing Co Ltd v Meadows** [1991] UKEAT 125_90_1411 and **Fordyce v Hammersmith and Fulham Conservative Association** [2006] UKEAT/0390/05/1301 and **KD (Inattentive Judges) Afghanistan** [2010] UKUT 261 (IAC)): an acceptable definition of sleep is to have one's eyes closed for a sustained period. That, she submits, is all that is required for the appearance of sleep. The appearance of sleep, she

submits, is as unacceptable as actually sleeping because Tribunal members are expected to demonstrate that they are alert and aware. The "sleep" need not be acknowledged or admitted by the sleeper to still be treated as "sleep" or lost alertness and attention. She notes that in **Fordyce** HHJ Reid QC observed that from common experience many a schoolchild and perhaps a number of junior counsel had learned over the years the kneejerk reaction of appearing to turn to the correct page in the bundle though having a snooze. The pen, she asserts, was not moving. The fact that Mr Lowndes did not slump, his head did not lull, he did not jerk himself awake and there is no observation to support him being asleep other than the fact of his eyes being closed, did not defeat a conclusion that he was asleep, for she asserts the pen did not move. She complains that the Judge, though on one occasion he witnessed the closed eyes and decided to nudge Mr Lowndes, did nothing about it at the hearing. Falling asleep for seconds, she contends, if not moments, is still too much in a Tribunal. She argues, therefore, that an event as short as the spasm was, effectively, sufficient: it had needed physical intervention to stop it.

27. In slightly different submissions, she concentrated not on the consequences of the observations but the potential effect of the medication which Mr Lowndes admitted taking. He had an unnamed major medical condition for which he took tramadol. If tramadol might make someone unfit to drive, then it would equally make that person unfit to sit as a member of the Tribunal, for the degree of concentration involved would be at least as great as that required for the act of driving. There had been no consideration in case-law of sleep induced by medication, since the focus (see **Stansbury v Datapulse**) seemed to be on actual sleep or alcohol-induced sleep. There was a significant risk (and it may well have been the case, as she puts it, given the medical datasheets in respect of tramadol and tamsulosin) that Mr Lowndes was in fact inattentive as a consequence of the effect of the drugs irrespective of whether his eyes were

open or shut. Indeed, I might observe that it might be thought consistent with sleep that there was a possible cause of it indicated by the fact of the need for medication, which it must be presumed was taken for a reason. She argued that the questions which Mr Lowndes had asked of witnesses did not seem to her to be particularly relevant. It did not establish anything that he asked questions, for that might easily be done by someone who had for much of the evidence been paying little attention. It was sufficient to make the proceedings procedurally unfair that he, Mr Lowndes, should have been taking something that altered his state of mind. She observed that there was no obvious reason to her why Mr Lowndes should need to close his eyes. She too suffered from a form of dry eye syndrome, blepharitis. She had done so at the time of the Tribunal. But in her case she did not need to close her eyes to moisturize. She drew my attention to medical literature which suggested that, although certain environmental conditions could dry the eye, a form of treatment was to take the drops, and there was no suggestion that further action by closing of the eyes was needed to ensure that the eyes felt lubricated. In dealing with the tramadol data sheets, she observed that seeing, hearing or feeling things that were not there, the possibility of loss of memory, the possibility of convulsions all might be taken into account, as in the case of tamsulosin might be the incidence of somnolence in 0-4% of patients reporting nervous system side effects, though insomnia in 1-2%.

28. Nothing could be read from the failure of counsel for the Respondent to perform the duty suggested of counsel in **Stansbury** of raising the issue with the Judge because, it was gently suggested, the inference to be drawn was that the behaviour of Mr Lowndes was not unfavourable to the Respondent. She did not necessarily accept, although this may have been the force of, the suggestion made by the bench that the fact of sleeping, inattention, is neutral as

between the parties unless there are other facts relating to it which may characterise it as being evidence of an irrational hostility to one party or the other.

29. For the Respondent, Mr Nicholls asserted that there was far more here than just the explanation which was given by Mr Lowndes. There was properly objective material which showed that his explanation should be accepted as indicating not only that he was not inattentive but that the well-informed observer, knowing of the explanation and accepting it, would also be of that view. There were no facts – other than closed eyes, which had been explained - which suggested inattention. The pen plainly moved, for Mr Lowndes took full notes.

Conclusions on fact and assessment

30. I have come to these views on an assessment of the facts and, insofar as there are disputes in respect of the fact, I resolve them as follows.

31. First, I accept that Mr Lowndes had his eyes closed at various times throughout the three-week hearing on liability. Second, I accept that he made copious notes. He said so, and the Employment Judge, importantly, said so and said she had checked those notes. That is not consistent with him being regularly inattentive, although it does not exclude it altogether. Third, I note that he did have a dry eye syndrome. I accept that not least because he was able to produce the medication which he was taking for that specific condition. Accordingly, not only was the explanation a possible explanation for his eyes being closed but supported by his having medication. As to whether it was truly the reason for his eyes being closed, I do not accept that I can generalise from one person's medical condition to another. There will be elements of similarity. But, as I have already pointed out, biological variability is great. The

way in which a particular condition affects a particular person may have much in common with others but it is still likely to be unique or close to it. I see no reason to think that Mr Lowndes did not feel, at any rate, that he should close his eyes from time to time to prevent them from drying out. He could have been asleep. However, I note the evidence of counsel that she noticed his eyes being closed and did not think that he was. If she had done, it would have been her duty to raise the matter or, as Mr Nicholls put it in his closing address, at least prompted some reaction from the lay member, for instance by dropping a book, making a noise, or doing something which caused the lay member to waken. None of that did she do.

32. The fact that he asked questions indicates to me the likelihood that he thought he had heard enough of the evidence to be able to ask questions which would not sound ridiculous. If asleep for large portions of the evidence, it would be difficult to think that he would have had the confidence to do so. As to the materiality of those questions, the Judge thought them relevant. The other lay member also thought them relevant. Miss Reindorf thought they might have been misunderstood by the Claimant when she concluded the opposite. I conclude that though it was possible that they were not relevant, the inference from this material is that probably they were, even though they might have seemed not to be to the Claimant, and the Claimant thought they were not appropriate. They may not have always seemed to be to the Claimant. She was not a qualified or experienced lawyer, a point which is emphasised, quite rightly, a number of times. The fact that he made notes (confirmed by the Judge) and participated fully without any gaps in his discussion of the case with the other members of the Tribunal (that is their feedback) suggests to me as well that he did not miss any relevant part of the evidence. This is, as it seems to me, largely inconsistent with his having been asleep or inattentive. It is improbable that he would have shown no other sign of sleep (slumping, for

instance) throughout the hearing if indeed he had slept for as long as his eyes were said to be closed.

33. I balance against this the possibility that he was taking a strong painkiller which might have rendered him more likely to sleep and that on one occasion he certainly was inattentive, for reasons which might be explained by his taking tablets, but the same tablets, in effect, that he had been taking throughout the hearing. That gives rise to some supporting material for the Claimant's contention that he was indeed inattentive.

34. Taking all these factors into account, I have come to the conclusion on balance of probabilities that he was actually attending to the evidence. The closing of the eyes is explained. The taking of full notes and participation in questioning and discussion show he was not inattentive. Save for the "drooling" incident which has a separate explanation, there was no other sign of sleep or inattention.

35. The next question which I have posed for myself is whether the well-informed observer, within the test as I have set it out, would have thought there was a real risk, revealed by these facts, of inattention so as to render this hearing a hearing in which justice was not seen to be done as it should be. As to that, I shall add a number of comments at the end of this Judgment. But, taking into account the explanation given, which would have been known of by the well-informed observer, the objective material constituted by the notes, the fulness of those notes, the appropriateness of the questions, the fact that he asked questions, the fact that Miss Reindorf did not herself think that he was asleep, the fact that the Judge did not do so either though having a responsibility to ensure that the other members of the Tribunal were alert and attentive at all proper times (the fact that the Judge nudged Mr Lowndes on the one

occasion he thought he was asleep suggested that, had he thought on any other occasion that he was, he would have done just that) the conclusion must be and is that any observer, knowing of the facts, would in this case decide that there was no improper risk that there had been inattention. The risks of that were relatively immaterial. I do not regard the incident of turning the chair, said to be in response to the overhead draught, as being of real significance.

36. I come now to the 15 to 20 seconds in which Mr Lowndes was undoubtedly inattentive. As to that, there is Miss Elys's submission that any momentary inattention means that there has not been a fair hearing. Mr Nicholls submits that it should not be seen here as any more than trivial. It was short-lived. That is the only evidence about it. Neither party referred to it at the time, nor it seems did they refer to it specifically in submissions at the review hearing. I do wonder if, in the Claimant's case, that might not be because she saw it as part and parcel of the other occasions when his eyes were closed. But that is only a speculation. I accept Mr Nicholls' point that there may be a whole host of conditions which might be suggested as giving rise to voluntary inattention: sneezing, a coughing fit, the occasional pang of sciatica, matters of that kind, which may affect many courts and Tribunals but cause no real inattention about which any litigant or any observer of the system of justice would have any proper cause to complain. There was nothing in the evidence about the 15 to 20 seconds that suggests a real concern. That is because, says Mr Nicholls, the Judge having described what had happened said that, after having been nudged, "thereafter he, Mr Lowndes, remained alert with his eyes open". The Judge was plainly therefore alert to the possibility that what he had observed might be a symptom of some more serious cause.

37. Though initially concerned about that incident and whether it might not have some interaction generally with the observed condition of the eyes being closed, I have in the end

come to the conclusion that it was, as a 15-20 second incident, self-contained, arising probably on 20 February 2013 (the Claimant thinks it was the 21st, but this is not in her affidavit), and that it was regrettable but not of sufficient materiality to amount to a procedural irregularity which would vitiate the decision.

Conclusions: Summary

38. It follows that, taking the approach which I have done, I have concluded, first, as a matter of fact, on balance of probabilities, that Mr Lowndes did pay proper attention to the case and, second, that the well-informed observer, sitting as it were at the back of the court but having knowledge of the material facts, would not have thought there was a real risk this was not so. As a proposition of law I accept that where there are facts which suggest inattention but also an explanation for those facts, the explanation must be looked at critically: but if there is, at the end of that examination, a proper explanation which appears consistent with other facts and is supported by them, which can objectively be evaluated, then the appearance initially formed falls away and the true appearance then is that there has been a proper degree of attention.

Observations

39. Towards the end of her submissions, Miss Elys complained that this case concentrated upon that which was visible. What mattered was also the invisible effect of medication. For the guidance of Tribunals, I would say this: (1) that a party is entitled to an Employment Tribunal which is properly attentive. As Bingham LJ (as he then was) once said, a judge's job is to listen. The parties cannot be satisfied with the attention of some of the panel for some of a case. They are entitled to the attention of all of the panel for all of the case, trivial moments aside. It is not enough that one party can, after the event, brief another as to what has been missed. Justice must not only be done but must be seen to be done. Important in assuring the

public and the parties that justice is being properly done, an employment judge and the members of a Tribunal have an important responsibility. Each has a responsibility for their own performance. If they have any reason to think that they might be subject to inattention for extraneous reasons (it may be pain, it may be medication, it may be because of particular events in their personal life which make it much more difficult to concentrate on the case in hand) they should make that plain to the Tribunal and, if necessary, the parties should be told enough about it to make an informed decision as to their position. But the essential responsibility is not that of the parties. It is that of the judge ensuring that she or he is reasonably fit to sit in a judicial capacity.

40. I understand, having made an enquiry in advance of this case of the President of Employment Tribunals, that there is an accepted process whereby a lay member of Tribunals or an employment judge should notify an Employment Tribunal if they suffer from a condition which might be capable of misinterpretation by litigants. Indeed, if a lay member knows of such a condition, she or he should raise it with the judge at the first instance. Because each member has an obligation to the integrity of the Tribunal as a whole, they should tell those they are sitting with. This applies in particular to occasions when people may expect to be seen to have their eyes closed for very good reason when litigants would expect the eyes to be open. I suspect that in this case, for instance, had it been said at the outset that Mr Lowndes might, as one supposes he knew, have to take some time from time to time closing his eyes because of his eye condition and that the parties were told this and assured that he was nonetheless being fully attentive, and they should not misinterpret it, there would never have been this appeal. This guidance cannot be prescriptive for every case. Proper regard must be had to the confidentiality of some conditions, and an over-alarmist approach must not be taken: but what is called for in most cases is the exercise of judgment which will prevent what might very well have happened

here had there not been the ready explanation that there was, which could have been the loss of a substantial of days of court time, could have caused expense and trouble to both parties and could have done damage to the regard in which our system of justice is held, because the misunderstanding (as it, in my view, turned out to be) about whether or not a member was sleeping had been allowed to develop without the parties understanding the circumstances. I hope those observations will be of use in future cases.