Appeal No. UKEAT/0027/13/LA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 June 2013
Judgment handed down on 21 November 2013

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**

**MR P M SMITH**

**MR B M WARMAN**

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MS H AZIZ APPELLANT

CROWN PROSECUTION SERVICE RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MS HALIMA AZIZ<br>(The Appellant in Person) |
| For the Respondent | MR JACQUES ALGAZY<br>(One of Her Majesty's Counsel)<br>Instructed by:<br>Messrs Simon Muirhead & Burton<br>8-9 Frith Street<br>London<br>W1D 3JB |

**SUMMARY**

**PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity**

The Employment Tribunal erred in recusing themselves from hearing the Claimant's applications for a review of the Remedies Judgment to claim exemplary damages and to claim costs. The decision to recuse themselves for 'a potential conflict of interest' was not sustainable on the relevant material before them. The Respondent sought to uphold the recusal on grounds of appearance of bias. The Employment Tribunal did not err in rejecting the grounds on which the application was made before them: actual or apparent bias (described by them as "future potential for bias"). The relevant facts did not give rise to an appearance of bias. **Porter v Magill** [2002] 2 AC 357 and **Locabail v Bayfield Properties** [2000] IRLR 96 applied. In any event the Employment Tribunal erred in recusing themselves before taking reasonable steps to ascertain whether such action was necessary. Guidance in **Bennett v Southwark LBC** [2002] ICR 881 applied.

Appeal allowed. Case remitted to the same Employment Tribunal.

**THE HONOURABLE MRS JUSTICE SLADE DBE**

1. Ms Halima Aziz appeals from the judgment of an Employment Tribunal, Employment Judge Dr Watt and Mr Lyons ('the ET') sent to the parties on 23 January 2013 ('the Recusal Judgment') by which the ET recused themselves from further participation in proceedings on her claims. The Claimant contended that the ET erred in law and reached a perverse conclusion in recusing themselves. Further she contended that the recusal was an infringement of her right to a fair trial. The parties will be referred to by their titles before the ET, as Claimant and Respondent. The Claimant, who is a solicitor but not experienced in employment law, represented herself. The Respondent was represented by Mr Algazy QC.

2. The Claimant's claim of race discrimination against the Respondent has a long history which it is necessary to outline for the purpose of considering this appeal.

3. The Claimant is a solicitor who has been employed by the Respondent since 1991. She brought complaints against them of race and sex discrimination arising out of her suspension from duty and treatment in a disciplinary process. She presented a claim to the Employment Tribunal on 24 December 2001. I gratefully adopt the summary of the facts giving rise to the claims made by Lady Justice Smith in the judgment in the Court of Appeal on 31 July 2006:

> **"2. Ms Aziz is a solicitor and has been employed by the CPS since 1991. Since 1995, she worked for the Bradford Branch of the CPS. She is of Asian origin and of the Moslem faith. Her family originates in Pakistan. On 25 September 2001, that is just two weeks after the Al Qaeda attacks on the World Trade Centre, New York and the Pentagon, Washington, Ms Aziz was involved in conversations about those events with members of staff at the Bradford Magistrates Court. On 5th October 2001, her employers received a written complaint and the appellant was suspended from duty on 10th October. Her suspension was lifted on 17th October, when it was replaced by a transfer from Bradford to the Wakefield office. By that time, the appellant was unwell and unfit for work.**
>
> **3. Ms Aziz remained off work and, on the 24th December 2001, she lodged complaints at the ET that her treatment by the CPS during the period leading up to her suspension had been discriminatory on the grounds of both race and sex. Before those complaints came on for hearing, which was not until February 2003, the disciplinary proceedings against Ms Aziz had been discontinued, in April 2002, upon receipt of the report of Mr Bill Budge, who had been appointed by the CPS to investigate the incidents of 25th September 2001. Mr Budge's report exonerated Ms Aziz from any wrongdoing."**

**The Liability Judgment of 11 June 2004 and the appeals before the Employment Appeal Tribunal and the Court of Appeal**

4. The Claimant's claims were heard by the ET, which then included a second lay member, between 10 February 2003 and March 2004. By a decision sent to the parties on 11 June 2004 ('the Liability Judgment') the ET upheld her complaint of race discrimination. They found no discrimination on grounds of sex.

5. The ET found that the Respondent had acted in breach of their disciplinary procedures in a number of material respects to the detriment of the Claimant. In the absence of a satisfactory explanation for doing so, the ET drew the inference that the Respondent had so acted on grounds of the Claimant's race.

6. The ET made a number of highly critical finding against the Respondent. These included:

> **"15.48. …The Tribunal found it very difficult to believe that an organisation such as the Crown Prosecution Service would operate its disciplinary code in a manner fundamentally contrary to its terms. These departures were not nuances of opinion or an interpretation of the text but the clearest possible breaches of the express terms of the code which deprive the applicant of substantial rights and protections.**
>
> **…**
>
> **23. …One possibility was that the respondent's officials were incompetent and the treatment was the consequence of innocent mistakes. However, the respondent made no such admissions. Another possibility, if Mrs Ashton's account was to be believed, is that as a matter of policy the respondent deliberately and consistently deprives its employees of their rights and protections under the disciplinary code.'"**
>
> **…**
>
> **29. In taking action against the applicant under the disciplinary code the Respondent was in serious breach of its requirements at a number of crucial stages. …It was suggested by Mrs Ashton that the normal and usual practice of the CPS is to undertake disciplinary action in the manner she described. However, in the description she gave many of the steps taken (or omitted) in this case were contrary to the requirements of the disciplinary code and deprived the applicant of essential protections. Without the most convincing evidence the Tribunal was not prepared to accept the extraordinary proposition that the CPS acts in such a way as a matter of policy. Because such evidence was not given to us we do not accept Mrs Ashton's unsupported contentions made principally in re-examination. The Tribunal therefore concludes that the respondent acted in full knowledge that it was in material breach of its procedures.**

…

**37. The Tribunal has concluded therefore that the Respondent acted in serious breach of its own disciplinary code and wrongfully suspended the Applicant, wrongfully transferred her and wrongfully removed her from the rota and that its conduct in this regard was to a significant degree influenced by the Applicant's race and ethnic origins. This influence resulted in the Respondent's decision to proceed on insubstantial and self evidently unreliable allegations under the disciplinary code in circumstances where further enquiries ought to have been made. In so treating the Applicant the Tribunal is satisfied that the applicant was treated less favourably than the hypothetical white prosecutor would have been treated where such racial assumptions would have been absent. The Tribunal is also satisfied that the Applicant has been subjected to substantial detriment as noted above. Accordingly a remedies hearing should now be held."**

7. On appeal from the Liability Judgment to the Employment Appeal Tribunal ('EAT'), the Respondent contended that the ET erred in law in their construction of the Disciplinary Code and this error affected their conclusion. By a judgment on 23 May 2005 the EAT agreed and allowed the Respondent's appeal. They set aside the finding of race discrimination and remitted the claim to a different ET for rehearing. The EAT held that the ET's construction of the Disciplinary Code was "incorrect and inappropriate" and that this led them to "foreclose the possibility of such explanations put forward" by the Respondent. This wrongly led the ET to draw the inference of race discrimination.

8. On 31 July 2006 the Court of Appeal allowed the appeal by the Claimant and reinstated the finding of race discrimination made by the ET. In the course of her judgment with which the other member of the Court of Appeal agreed, Lady Justice Smith held of the relevant parts of the Disciplinary Code:

**"67. In my view, the meaning of these three provisions [in the Disciplinary Code] is clear and I share the ET's surprise that the CPS should contend that they mean something else…**

…

**73. I share the ET's surprise at Mrs Ashton's claimed understanding of the code. Quite apart from the clear meaning of the words, to which I have already referred, the code's express purpose is to help managers to deal fairly with employees against whom a disciplinary complaint is made…**

**74. Mr Lynch was critical of the vehemence of the ET's language. In my view he should not be. The ET regarded the breaches of the code as flagrant. The breaches were, in my view, serious and obvious. Given that Mrs Ashton was experienced in HR and Personnel matters and had apparently received advice from more senior HR/Personnel officials, such as Mr Clark, the ET was entitled to conclude, as it did, that the CPS knew that it was not complying with its own code.**

> **75. Mr Lynch accepted that, if the ET's findings were justified that the CPS had knowingly breached its own code, he could not seek to overturn the finding that the CPS had treated Ms Aziz differently from other employees on racial grounds. His complaint had been that the ET's assessment of the CPS witnesses was deeply unfair. It follows from what I have already said that I do not consider that they were. It is clear that the ET were most unimpressed by Mr Cowgill and Mrs Ashton. They were sceptical of the failure to call Mr Clark of Personnel 2 who had apparently provided important advice for Mrs Ashton. They were unimpressed by the absence of written notes of various events which ought, as a matter of good practice, to have been recorded. Not only had the ET formed an unfavourable view of those two witnesses, they positively rejected their evidence that they had regarded this case as simply a matter of misconduct by a solicitor and had not considered that there were any racial implications. They were entitled to reach that conclusion. The ET said that these 'studied denials' were revealing of what lay behind their actions. That is just the kind of material on which ETs can and do draw the inference that the less favourable treatments they have found was on racial grounds."**

The case was remitted to the ET for assessment of compensation.

## The Remedies Judgment of 1 September 2008

9. By the time of the Remedies Hearing which started on 23 June 2008 the ET was constituted by two of the original panel who had conducted the Liability Hearing, Employment Judge ('EJ') Dr Watt and one lay member, Mr Lyons. The Claimant was represented at the hearing by Ms Althea Brown of counsel and the Respondent by Mr Epstein QC with Mrs Fraser-Betlin.

10. The Remedies Hearing concluded on 9 July 2008. On 15 July 2008 the Respondent's solicitors wrote to the ET office enclosing a press release issued by the Claimant's solicitors which set out critical words the EJ was said to have used during the Remedies Hearing concerning the conduct of the Respondent. At the hearing to determine an application for a review of the Remedies Judgment the ET identified the key passage in the judgment as follows:

> **"We understand from leading Counsel representing the CPS that these issues were subsequently investigated during the course of the hearing and the Tribunal accepted that the CPS had not deceived the Employment Tribunal, the EAT and the Court of Appeal."**

11. The ET sent their decision on remedy to the parties on 1 September 2008 ('the Remedies Judgment').

12. The ET made orders for compensation including for payment of £10,000 by way of aggravated damages. In considering the claim for aggravated damages, the ET referred at paragraph 34 of their judgment to the "Lewis Report" into the events related to the Claimant's claims. This was an undated report which appeared to have been issued on about 2 May 2007. Its author was Mr Peter Lewis, the Chief Executive of the Respondent. The ET commented at paragraph 35 that:

> **"The main focus of the Lewis Report seems to be the procedures (which issues the Respondent also pursued in the EAT and the Court of Appeal) but in many ways these procedural points only serve as a diversionary escape from the primary issue of discrimination."**

The ET noted at paragraph 34 that Mr Lewis stated at paragraph 14 of his Report:

> **"I can find no evidence of racism in their conduct nor that of people providing the direction and guidance in Personnel 2."**

and observed:

> **"Because the acts of discrimination were central to the judgment against the Respondent Mr Lewis's conclusion clearly calls for an explanation but, unfortunately, none was forthcoming either in his report or at this Hearing."**

The ET further held:

> **"36. …The report concludes that Mrs Ashton, Mr Cowgill and Mr Franklin were acting in accordance with the training and guidance they had received from the CPS Headquarters and on that basis Mr Lewis absolves all three of any blame. However, in his Report Mr Lewis is very critical about the practices within the Human Resources Directorate of the CPS (principally in paragraphs 5 to 8) and in this regard it is interesting to note that he said as follows:**
>
> > ***'I do not want to imply from my findings that this unwritten policy was operated secretly or discretely. Advice based on this unwritten policy was openly given for many years and confirmed at the training, provided to members of staff who were charged with operating the policy.'***
>
> **…However, having identified blameworthy conduct (which we can only take to mean that Mr Lewis perceived some causal connection between that advice and the matter of which the Claimant had complained) it seems Mr Lewis decided no action against any employee was necessary. Even within the scope of Mr Lewis's deeply flawed findings that seems an exceptionally strange decision.**

> **37. …Ms Watt [Deputy Director of Human Resources] confirmed that the Code was negotiated and agreed with the trade unions and the employees' representatives and was incorporated as part of the terms and conditions of employment and was therefore relied upon by the employee side and their legal advisers in the belief that both sides were contractually bound to observe it. However, the Respondent did not inform the other parties to that agreement that the practices and procedures actually adopted by the CPS were not reflected in the agreed Code and, of course, as noted elsewhere in this Judgment it also failed to inform this Tribunal, the EAT and the Court of Appeal of that fact."**

The ET referred to the argument advanced on behalf of the Respondent in the EAT and Court of Appeal that the Disciplinary Code applied as published. They held at paragraph 48:

> **"…It is now apparent that persons at a senior level in the CPS headquarters were aware that there were highly material variations to those procedures (actively promoted over a significant period of time) and that these variations were inconsistent with the express terms of the formal promulgated policy. In consequence the Courts were being invited to adjudicate on false premises by being led to believe (as was this Tribunal) that the Code contained all of the material elements of the policy. ….Even if one were to take an exceptionally generous view and say that withholding this crucial information from the Employment Tribunal was a genuine mistake given the terms of this Tribunal's Judgment there could be no possible misunderstanding thereafter on the part of the Respondent as to the urgent need to disclose the true position. It would have been obvious to the HR department that the deficiencies this Tribunal had alighted upon were the 'unwritten' variations to the Code. Accordingly the subsequent failure to disclose the true position regarding these unwritten variations at the Hearings in the Employment Appeal Tribunal and the Court of Appeal cannot be excused as a mistake. This 'unwritten' policy was not Mr Clark flying solo, this was not an aberration, but a well-established practice incorporated into the respondent's formal training programmes. Persons at a senior level in the CPS reading the Tribunal's Judgment must have realised that what this Tribunal had identified was in fact those 'unwritten' variations. Nevertheless they allowed Leading Counsel to advance arguments in the EAT and the Court of Appeal clearly predicated on the proposition that the Code alone represented the procedures followed by the respondent when they knew that was not the true position. It is also of interest to note in the records of interviews preparatory to the Lewis report that the trade union representative apparently expressed great surprise that this policy variation had not been disclosed. In these circumstances what other conclusion can reasonably be drawn other than that material facts were knowingly withheld from the EAT and the Court of Appeal and probably from the Tribunal as well. For any Respondent to do this is deplorable. For the CPS to do this is utterly astonishing. The Claimant has had to endure some six years litigation with this deceit at the heart of the proceedings. The Claimant has struggled with representation with several firms of solicitors and three changes of Counsel (and was also unrepresented at times notably in the Court of Appeal) because of her limited means whilst the Respondent with the substantial resources of a public body has been able to employ a large firm of solicitors and Leading and Junior Counsel throughout. This gross inequality of arms merely serves to underline the aggravating circumstances of this Respondent's conduct of the proceedings."**

13. At paragraph 50 the ET listed ten factors which led them to make an award of aggravated damages. Included amongst those were:

> **"(b) It appears highly probably that the Respondent withheld from the Employment Tribunal and the Court of Appeal material evidence of a policy and practice the Respondent had followed over a considerable period of time which evidence was of significant relevance to the issues to be determined at each of the Tribunal and the Court Hearings.**
>
> **…**
>
> **(g) That in relation to Mr Cowgill and Mr Franklin the documents produced strongly suggest that the Respondent's then Chief Executive, Mr Foster, and the then Director of Human**

> **Resources, Ms O'Connor specifically commended and approved their conduct and that assurances of a similar kind were given to Ms Ashton.**
>
> **(h) That the Lewis Report is a seriously inadequate response because it avoids the issue at the very heart of this matter by the device of saying that there was no evidence of discrimination and therefore appears to condone the discrimination by that means."**

14. The ET did not make an award of exemplary damages for the reasons set out in paragraph 51:

> **"The Tribunal has carefully considered the relevant case law and has concluded that it would not be appropriate to make an award of exemplary damages in this case following the guidance of the House of Lords that it is unnecessary to do so where the award of aggravated damages is sufficient to meet all the circumstances of this case. We believe that the award of £10,000 aggravated damages is, in principle, sufficient compensation to the Claimant and therefore we make no award of exemplary damages. However, we add this reservation: we have assumed a punitive award of damages was not required in this case only on the assumption that a full, complete and unconditional apology will now be given within the next 42 days in accordance with our Recommendations. If we had been in a position of knowing that such an apology would not be given then in those circumstances we would have been minded to make punitive award of exemplary damages in addition to the other awards."**

15. The ET gave both parties leave to make an application for a Review with in 70 days of the date of the Remedies Judgment. An application by the Claimant for costs would be heard at the same time as any application for a Review.

## The Review application and appeal from the Remedies Judgment

16. By letter dated 15 September 2008 the Respondent applied for a Review and on 10 October lodged a Notice of Appeal from the Remedies Judgment. In the application for review of the Remedies Judgment the Respondent asserted under Ground 1:

> **"…Although the Employment Judge indicated on Tuesday 24 June 2008 (before evidence or submissions had been heard but after he had seen the report by Mr Lewis) his view that the CPS had conducted its cases before the Tribunal the EAT and the Court of Appeal deceptively during the course of the hearing and before submissions had been made the Judge then withdrew those comments and apologised twice for having made them. This matter was accordingly no longer in issue and leading Counsel for the CPS made no submissions on it. …In the circumstances there has been a material irregularity in the conduct of the Tribunal Heading in that the Tribunal has now made a finding that the CPS acted without utmost probity and acted misleadingly."**

The application for Review also contained two other grounds.

17. Subsequently the Respondent confirmed that they were seeking the removal of paragraphs 50(b), (g) and (h) of the Remedies Judgment of 1 September 2008. These contained passages which were critical of the Respondent.

18. On 10 October 2008 the Respondent lodged a Notice of Appeal from the Remedies Judgment raising the points set out in the application for a Review. On 26 November 2009 the Appeal from the Remedies Judgment was stayed.

**The Review Judgment of 2 November 2009**

19. The Review Hearing took place nearly ten months after the application for Review. It started on 28 July 2009. The Claimant was again represented by Ms Brown but the Respondent was now represented by Mr Allen QC. The ET recorded that on their reading day they noted from two paragraphs in their skeleton argument that the Respondent proposed that the ET should recuse themselves. The ET set out the material paragraphs of the skeleton argument in paragraph 4.1 of their judgment:

> **"4.1 …The contents of paragraphs 80 and 81 are as follows:**
>
> > ***'The Respondent awaits the ET's determination on this issue but must make it clear that on the basis of the information it presently has as to the way in which this matter has been dealt with the ET should recuse itself from further consideration of this case. To accuse a party of a want of probity on the basis of having misled a Court and two Tribunals and to do so in the context in which not only have the ET led a party to understand it would not do so but also had it specifically brought to its attention leading the Respondent to conclude pending any further explanation as to how this can have happened that it cannot now have a fair hearing from this ET.'"***

20. The ET prepared a note setting out their belief that there had been a misunderstanding. They had not withdrawn the "deception" issue but they acknowledged that the Respondent could have mistakenly believed that they had done so. The ET record at paragraph 4.3:

> **"Mr Allen decisively rejected the concept of mistake and the Tribunal's approach to the matter."**

21. The ET set out a detailed account of events at the Remedies Hearing and concluded from these they had retracted their criticism of one witness, Ms Ashton. The ET held:

> **"8.51. …The basis for changing our view about Ms Ashton was the malpractice of the officials in head office disclosed by the Lewis report. An altered view of Ms Ashton could not possibly mean that we had accepted serious malpractice on the part of the Respondent because that malpractice was the reason for the altered view of Ms Ashton.**
>
> **…**
>
> **8.55. …The concept of the Tribunal apologising to the Respondent for the malpractice on its part that had brought this situation about was never within the contemplation of the Tribunal. On these facts it would have been a quite extraordinary thing if it had been because the one proposition contradicts the other."**

The ET concluded that "there has been an unfortunate misunderstanding". They stated that had the Respondent not made submissions on grounds raised in the application for Review which covered arguments which would have been addressed by Mr Epstein QC if he had not thought the allegation of deception had been withdrawn, a Review would have been granted for the Respondent to make such submissions.

22. The ET also recorded that on the first day of the hearing, 29 July 2009, Mr Allen QC raised the Respondent's concerns regarding the letter of 15 July 2008. At paragraph 5.1 of their judgment the ET observed:

> **"The proposition put forward by Mr Allen was that the Employment Judge had not replied to this letter, that the letter raised an issue of fundamental importance which ought to have been addressed by him and his failure to act on that letter and thereafter issuing a judgment containing findings that related to matters directly challenged by that letter constituted conduct of such a nature that the Respondent could have no further confidence in the Tribunal to fairly and impartially adjudicate on the issues to be determined in this case."**

The EJ explained the outcome of his enquiries as to his actions in relation to the letter of 15 July 2008. He had written to the ET office stating:

> ***"Given the delay already incurred in providing a response to the letter from SMB and given that promulgation could possibly be effected quite shortly it seems to be that the most appropriate way forward would be to suggest to the respondent that it should await the Judgment because it touches upon the issues in contention. The respondent could then***

> ***consider those passages in the Judgment that refer to the matters I dispute and the respondent would then be in a position to further consider the terms of its complaint."***

No such letter was sent by the office.

23. The ET explained:

> **"5.16. The failure to respond to the Respondent's letter of 15 July 2008 can now be[en] seen to be the result of a series of errors...**
>
> **5.17. A number of concluding observations are called for regarding this matter. Firstly, Mr Allen's complaints were expressed in terms of very seriously questioning the personal conduct of the Employment Judge. This was a charge brought without prior notice or warning. As noted above on the reading day when the Tribunal read the skeleton argument the extent of the Respondent's concerns did not come across to the panel in the way these were expressed the following day. Furthermore, when those concerns were raised Mr Allen's presentation was not merely forceful but he made it repeatedly clear that he was not prepared to countenance the Employment Judge's explanations. Accordingly, the atmosphere created was quite unnecessarily hostile which distinctly hindered rather than helped in the search for the truth of the matter.**
>
> **5.18. Secondly, the Respondent did not raise its concerns with the Employment Judge at any point between July 2008 and July 2009 which given the seriousness of the alleged judicial misconduct is extremely surprising. It would have been very much more helpful if the Respondent had raised its concerns in advance to enable appropriate enquiries to be carried out. If the Tribunal, and the Claimant could have been appraised of the Respondent's concerns that would have allowed these matters to be considered in a calm and balanced manner."**

24. The ET did not accept that bias or the perception of bias had been established. At paragraph 13.7 the ET held in respect of the alleged withdrawal of the criticism of deception by the Respondent:

> **"Whatever the explanation an impartial but informed observer would readily see that a misunderstanding that occurred and that there was no reasonable basis for the suggestion that the Employment Judge had withdrawn the issue."**

25. As for the allegation of bias in relation to the letter of 15 July 2008, the ET held at paragraph 13.8 that after investigation it was clear that the EJ had dealt with the matter promptly but due to administrative failings a letter had not been sent to the Respondent conveying his views. Those events did not give rise to a perception of bias.

26. The ET refused to recuse themselves. The ET also dismissed the Respondent's application for a Review of the Remedies Judgment.

**The Recusal Judgment of 23 January 2013**

27. A further hearing was convened to deal with an application by the Claimant for a Review of the Remedies Judgment in order to claim exemplary damages and costs. An issue over the tax on the compensatory award was also to be considered.

28. Although the date of the costs application is not referred to in the Recusal Judgment, there is in the bundle for the EAT a witness statement by the Claimant dated 3 March 2012 in support of her application for costs. It is therefore necessarily to be inferred that an application had been made by that date. It is apparent from paragraph 9 of the statement that the conduct of the Respondent's counsel at the Remedies Review Hearing, Robin Allen QC, was one of the matters relied upon in support of the application for costs. The Claimant served an undated Schedule of Costs listed in the Index as made in August 2012 which referred to her statement of 3 March 2012 and included amongst the many matters supporting her application her criticisms of the conduct of the Respondent's counsel at the Remedies Review Hearing. In response to the application for costs the Respondent served a statement from Mark Summerfield, Director of Human Resources. It was undated but is listed in the Index as September 2012. He had not been present at the Remedies Review Hearing but stated at paragraph 20:

> **"I have spoken to my colleague Gillian Stillwell, who attended the Review Hearing and she has advised me that in her view the criticisms made are inaccurate."**

29. The hearing of the Remedies Review application asking for exemplary damages and costs took place on 17 and 18 December 2012. The Claimant appeared in person and the Respondent was represented by Mr Algazy QC.

30. On the first day of the hearing after the Claimant had given her evidence in chief but before cross-examination the ET retired at the "election of the Employment Judge to consider one of the matters the claimant had relied [upon] in support of her claim for costs". This was the Respondent's conduct at the hearing in 2009. The ET were of the view that "Even though this was only one of a series of complaints the claimant was advancing in pursuance of her claim for costs, [the respondent's alleged unreasonableness in the conduct of the proceedings], it was, nevertheless, a significant complaint". The ET held:

> **"3. The Employment Judge and (the sole remaining member of the panel) Mr Lyons considered that the claimant's reliance on the 2009 Hearing would potentially place the Tribunal in a very difficult position. The reason being that the conduct the claimant was complaining about had been, in large measure, directed towards the Employment Judge in person. The fundamental facts on which the claimant relied for her complaint were in accord with not merely the Tribunal's recollection but our formally recorded accounts. The Tribunal's concerns were further compounded by the contents of one of the respondent's witness statements indicating that the claimant's complaints on this issue were to be resisted. In that event the Tribunal's role would inevitably be drawn into the dispute between the parties. The heart of the problem was if the respondent did contest the facts it would be in direct conflict with the Tribunal."**

31. An extract of the ET's comments pre and post lunch on 17 December 2012 includes:

> **"Resume at 2pm**
>
> **JW (Judge Watts) It is clear that Mark Summerfield was not aware of the various matters.**
>
> **…**
>
> **HA (the Claimant) Comments RA's (Mr Allen QC) behaviour was a small aspect of her claim for costs.**
>
> **JW (JW responding to HA) JA also said that RA's conduct was just a small element of the costs application."**

32. The hearing was then adjourned for the remainder of the day. On 18 December 2012 counsel for the Respondent made an application that the ET should recuse themselves from any further involvement in the proceedings. The Respondent's application was founded on the proposition that observations made on the first day of the hearing by the EJ and Mr Lyons exhibited actual or potential bias. Counsel relied on paragraph 13 of the judgment in **Ansar v**

**Lloyds TSB** UKEAT/0609/05/SM to contend that the ET's observations on the first day of the hearing were expressed in such forceful terms that the well-informed and impartial bystander would be forced to conclude that there would be a real possibility of bias

33. The ET concluded at paragraph 12 that the Respondent's contention of actual or apparent bias was not well founded. They held of their criticisms of the Respondent in earlier judgments:

> **"Merely to restate such matters of fact is not to exhibit bias or raise the possibility of bias…"**

The ET explained that they drew attention to the concerns articulated in paragraph 3 of the Recusal Judgment to be "scrupulously fair and open". They did not accept that they were biased or "that there was any future potential for bias".

34. However the ET held that they should recuse themselves because one of the matters relied upon by the Claimant in support of her application for costs was the conduct of the Respondent's counsel to the EJ at the Remedies Review Hearing. The ET held:

> **"14. Accordingly, the claimant having raised the issue of the respondent's conduct it could not be disregarded. However, the Tribunal, after very careful consideration, has concluded that the respondent has placed us in an impossible position by proposing to resist that part of the claimant's complaints. The implication of such resistance must be that despite the overwhelming evidence to the contrary the respondent intended in effect to maintain the quite disgraceful allegation it made and has never withdrawn regarding the conduct of the Employment Judge and to do so through a witness who was not present at the Hearing in question. Accordingly, the respondent has created a situation rendering it extremely difficult for the Tribunal to determine the few remaining issues in this exceptionally long drawn out case.**
>
> **15. Therefore, the regrettable consequence of the respondent's conduct is this: any decisions where it could be said that because of the nature of the complaints it would be impossible for the Tribunal panel to disengage our personal feelings would be open to challenge. Therefore, in these exceptional circumstances we see no alternative other than to recuse ourselves from these proceedings in their entirety. We explore our reasoning for this decision more fully below."**

The ET considered that the Respondent's actions they had put them in an intolerable position. The reason they concluded they had to recuse themselves was:

> **"22. …because we would have to make a determination on an issue relating to the conduct of proceedings that not merely involved us in our judicial capacity, but involved issues, particularly for the Employment Judge, that related to his personal credibility and to his personal conduct. We have concluded that it is impossible for the Tribunal to adjudicate on that issue in the circumstances created by the respondent. However, this is more akin to recusing oneself for a potential conflict of interest rather than one of bias."**

## Appeal from and application for Review of Recusal Judgment

35. On 29 January 2013 the Claimant lodged a Notice of Appeal from the Recusal Judgment and on 6 February an application for a Review of that judgment. By a judgment sent to the parties on 4 March 2013 the EJ refused the Claimant's application for a Review. The EJ observed that the grounds of application for a review appear to replicate generally the grounds of her appeal to the EAT. He stated:

> **"7. …The respondent's apparent refusal to countenance the response offered by the Employment Judge in response to those allegations gave rise to the unambiguous implication that the Employment Judge was considered by the respondent to be untruthful. To add further injury to its offence the respondent pursued those complaints in an extremely hostile and unpleasant matter.**
>
> **…**
>
> **9. …The respondent did not withdraw its disgraceful allegations nor offer any apology. The consequence of this was that the Tribunal was being forced into the position of adjudicating on a material issue in dispute between the parties that concerned and involved the panel in our personal as well as our judicial roles."**

## The submissions of the parties

36. The Claimant submitted that the ET erred in law by misunderstanding or misapplying the relevant law in respect of recusal. Further the Claimant contended that the ET reached a decision to recuse themselves which was perverse due to being "forced" to do so by the conduct of the Respondent and their lawyers.

37. The Claimant rightly drew attention to the basis upon which the ET recused themselves. They had rejected the allegation of bias or appearance of bias, the basis for the Respondent's application for their recusal. The ET held that they were not biased and their actions had not

given rise to future potential for bias, but recused themselves because of an alleged "conflict of interest".

38. The Claimant submitted that nothing had changed since the Remedies Review Judgment of 2 November 2009 when the ET had refused an application made by the Respondent that they recuse themselves. The ET had considered and rejected contentions by Mr Allen QC on behalf of the Respondent that the EJ had improperly retracted an alleged withdrawal of serious criticisms of the Respondent and proceeded to judgment ignoring a letter from their solicitors written to him before judgment pointing out their understanding that the ET had accepted that the Respondent had not deceived the ET and the courts. The matters which the ET relied upon on 23 January 2013 to recuse themselves had all occurred in the course of the hearing in July 2009 following which the ET had decided not to recuse themselves.

39. Before us the Claimant made it clear that she did not need to rely on allegations against Mr Allen QC because they were a very small part of her claim for costs. She said that she informed the ET that she would not rely on the allegations against Mr Allen QC. Mr Algazy QC could not recall whether these had been withdrawn.

40. The Claimant pointed out that the Respondent had appealed from the Remedies Review Judgment in which the ET had refused to recuse themselves. That appeal and an appeal from the Remedies Judgment were not pursued. Nothing had changed since the Remedies Review Judgment of 2 November 2009 to justify a different decision by the ET to recuse themselves in January 2013. The Claimant contended that the ET had failed to consider **Hart v English Heritage** [2006] IRLR 915H in which it was held that the ET's power to reconsider case management decisions under Schedule 1, Rule 10 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulation 2004** should only be done if there had

been a change in circumstances since the original order, direction or decision was made. In their judgment of 2 November 2009 on the Respondent's application for a Review of the Remedies Judgment, the ET had made adverse observations about the approach to them adopted by Mr Allen QC at the hearing. That behaviour was nothing new. They had not recused themselves in 2009. They should not have recused themselves in 2013.

41. The Claimant contended that the ET erred in holding that an alleged "conflict of interest" prevented them from hearing the case without providing any legal basis for such a conclusion.

42. The Claimant submitted that the decision of the ET to recuse themselves was perverse. They recused themselves because of a perceived potential conflict of recollection over the behaviour of counsel at the Remedies Review Hearing. Before us the Claimant stated that she did not need to rely on allegations against Mr Allen QC that conduct formed only a small part of application for costs. Mr Algazy QC agreed that the Claimant told the ET that the allegations against Mr Allen QC formed a small part of the basis of her claims for costs but could not recall her saying that she was not going to rely on them.

43. The Claimant alleged that the ET erred in considering that their and the Claimant's recollection of that conduct was challenged in Mr Summerfield's witness statement. Mr Summerfield had not been present at the hearing at which this conduct took place. The Respondent had not produced a statement from Ms Stillwell who had been present and who was the source of Mr Summerfield's information. The ET did not say why they considered a conflict had arisen.

44. The Claimant contended that the ET were being "blackmailed" by the Respondent. They were told that they would have to appeal if they did not recuse themselves.

45. The Claimant complained that the Respondent had not given the notice required by the ET Rules of their application for recusal made on the second day of the hearing. The application was not even put in writing. The application was made on the basis of apparent bias, the ground on which the Respondent sought to uphold the recusal decision.

46. The Claimant submitted that if and insofar as the Respondent had been concerned at criticisms made of their conduct by the ET, the Court of Appeal vindicated those criticisms. The ET had made and was entitled to make robust criticisms of the Respondent where it considered these were justified. The fact that the ET had made critical comments about the Respondent on 17 December 2012 was nothing new.

47. The Claimant contended Proposition 11(c) in paragraph 13 of the judgment of the EAT in **Ansar** upon which the Respondent relied before the ET is not relevant. All issues of fact had been determined in previous judgments in which the ET had made their views of the Respondent's conduct clear.

48. The Claimant referred to the judgment of the EAT in **Heski v British Telecommunications plc** UKEATPA/0378/11/DM in which HHJ McMullen QC observed at paragraph 7:

> **"The Claimant misunderstands the distinction between a finding against him and a finding that his case will not be listened to objectively."**

The Claimant submitted that the Respondent had adopted a similar erroneous approach to criticisms made of them by the ET in this case. Authorities such as **Iteshi v British Telecommunications plc** UKEAT/0378/11 show that ETs must have broad backs.

49. The Claimant pointed out that the Respondent had not appealed the Liability and Remedies Judgments on grounds of bias. Their appeal from the Remedies Review Judgment included an appeal on grounds of bias from the failure of the ET to recuse themselves. That appeal was not pursued.

50. The Claimant contended that in all the circumstances the ET had erred in law and reached a perverse conclusion in recusing themselves. The decision should not be upheld on grounds of apparent bias.

51. Mr Algazy QC made it clear that the Respondent was not seeking to maintain the Recusal Judgment on the basis of the reasoning of the ET. The Respondent contended that the decision to recuse should be upheld on the basis of their application on 18 December 2012, apparent bias.

52. Mr Algazy QC explained that the Respondent's recusal application made on 18 December 2012 was in circumstances which were entirely new. On 17 December 2012 the EJ had vehemently expressed adverse feelings about the conduct of Mr Allen QC, the Respondent's counsel at the Remedies Review Hearing. The EJ initiated the exchange on recusal and said that the conduct of Mr Allen QC at the Remedies Review Hearing was of real concern. Unusually the lay member of the ET was invited to express his views which were also adverse to Mr Allen QC. The hearing was adjourned and the names of the authorities to be relied upon by the Respondent in a recusal application the next day were sent to the Claimant.

The recusal application was made orally the next day, 18 December 2012, on the basis of apparent bias.

53. Mr Algazy QC contended that the conduct of the ET on 17 December 2012 fell within the legal test for apparent bias explained by Lord Hope in **Porter v Magill** [2002] 2 AC 357 at paragraph 103. The fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the ET was biased. Counsel submitted that the trenchant way in which the EJ had expressed himself about Mr Allen QC on 17 December 2012 crossed the ill-defined line referred to in the High Court of Australia in **Vakaura v Kelly** [1989] 167 CLR 568 and in **Timmins v Gormley** one of the cases considered under the title usually referred to as **Locabail v Bayfield Properties Ltd** [2000] IRLR 96. Also relying on that authority, Mr Algazy QC submitted that in accordance with **Locabail** paragraph 25:

> **"…if in any case, there is real ground for doubt, that doubt should be resolved in favour of recusal."**

54. Counsel for the Respondent relied upon **Ansar** ([2007] IRLR 211) in which the Court of Appeal in paragraph 14 approved propositions formulated by Burton J in the EAT in the same case. Mr Algazy QC initially referred to those set out in sub-paragraphs (c), (d) and (e) of Proposition 11 but rightly acknowledged that (c) was not directly in play in this case. Proposition 11 included the following:

> **"11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at para. 25) if:**
>
> **(d) on any question at issue in the proceedings before him the judge had expressed views, particularly in the court of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective mind; or**
>
> **(e) for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous consideration, prejudices and predilections and bring an objective judgment to bear on the issues."**

Counsel contended that (d) was relevant as the EJ had expressed himself in extreme and unbalanced terms to the disadvantage of the Respondent. Regard had to be paid to the tenor of his remarks on 17 December 2012. Mr Algazy QC further contended that the events of 17 December 2012 and the invitation to the lay member and his expression of views adverse to the Respondent's previous counsel, Mr Allen QC, brought the case within (e) of **Ansar**.

55. Counsel accepted that the major plank of his argument on apparent bias rested on the comments made by the EJ about Mr Allen QC on 17 December 2012 which reflected the vehemence of his views about him. Mr Algazy QC referred to paragraph 7 of the Remedies Review Judgment in which the EJ had criticised Mr Allen QC in robust terms. He submitted that "the Judge went way too far" in his criticisms of the Respondent's former counsel.

56. Counsel for the Respondent considered each of the sub paragraphs in paragraph 3 of the Claimant's skeleton argument for this appeal. He submitted that the finding of the ET that it was not biased did not answer the allegation that they gave the appearance of bias. The argument now advanced by the Claimant based on **Hart** that the decision to recuse was one of case management which should not be re-considered unless there had been a change in circumstances was not advanced to the ET. Mr Algazy QC contended that in any event the application to recuse on grounds of appearance of bias was based on new facts: the attitude of the EJ to the Respondent's previous counsel expressed on 17 December 2012. The test for apparent bias in **Magill** was satisfied. It was submitted by Mr Algazy QC that no injustice would be suffered by the Claimant by the recusal of the ET. Their decision to recuse themselves should be upheld on the grounds of apparent bias.

**Discussion**

57. The ET did not outline the legal basis for recusing themselves other than describing it as a "conflict of interest". In our judgment a conflict of interest, if it arises on the facts, can give rise to bias or an appearance of bias, the latter by applying the well known principles in **Porter v Magill**, **Locabail** and many other authorities. That 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".

58. The Court of Appeal in **Ansar** dismissed an appeal by a Claimant who had unsuccessfully applied on grounds of apparent bias to an ET that an EJ who had conducted a hearing of his first claim recuse himself from further involvement in a second claim. The Claimant had lodged a Notice of Appeal from the judgment in the first claim alleging apparent bias and misconduct. After judgment, the Claimant brought a second claim. An application to strike out that claim was to be heard by the same EJ. The Claimant's application for his recusal was refused by the Regional Chairman and the EJ.

59. In paragraph 14 of the judgment of Waller LJ, the Court of Appeal approved propositions set out by Burton J to be applied to recusal applications. These included:

> **"l. The test to be applied as stated by Lord Hope in Porter v Magill [2002] 2 AC 357, at paragraph 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at paragraph 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.**
>
> **2. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: Locabail at paragraph 21.**
>
> **3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [l9861] (sic) 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at paragraph 22.**
>
> **4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to**

**an unfounded disqualification application: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in Locabail at paragraph 24.**

**5. The EAT should test the employment tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in Lodwick, at paragraph 18.**

**6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: Locabail at paragraph 25.**

**7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at paragraph 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell [2004] All ER (D) 225 (Jul) at paragraph 4.**

**8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in Bennett at paragraph 19.**

**…**

**10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: Locabail at paragraph 25.**

**11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at paragraph 25) if:**

**…**

**d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,**

**e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."**

At paragraph 22 of the Recusal Judgment, the ET expressly rejected the suggestion that they had been biased or that there was any future potential for bias. However because they would have to make a determination on an issue relating to the conduct of proceedings that not merely involved them in their judicial capacity, but involved issues, particularly for the EJ, that related to his personal credibility and to his personal conduct they concluded that:

> **"…it is impossible for the Tribunal to adjudicate on that issue in the circumstances created by the respondent. However, this is more akin to recusing oneself for a potential conflict of interest rather than one of bias."**

Although they did not expressly formulate it, the issue the ET referred to was whether the conduct of counsel for the Respondent at the Remedies Review Hearing was as alleged by the Claimant in support of her costs application.

60. The ET stated in paragraph 3 of the Recusal Judgment that the Claimant's reliance on Mr Allen QC's conduct at the Remedies Review Hearing would "potentially place the Tribunal in a very difficult position". The ET's recollection and record of the facts on which the Claimant relied accorded with her account. The ET concluded that they "would inevitably be drawn into a dispute between the parties" if "this issue" were to be resisted. The ET's concerns were stated to be compounded by the contents of:

> **"…one of the respondent's witness statements indicating that the claimant's complaints on this issue were to be resisted."**

They continued:

> **"The heart of the problem was if the respondent did contest the facts it would be in direct conflict with the Tribunal."**

61. The ET decided to recuse themselves for the following reasons: (1) In support of her applications the Claimant was relying on the 2009 Remedies Review Hearing which was in large measure directed towards the EJ in person; (2) The facts upon which the Claimant relied accorded with the recollection of the ET and their "formally recorded accounts"; (3) The concern of the EJ that the ET would be placed in a very difficult position was "compounded by the contents of one of the respondent's witness statements indicating that the complainant's complaints on this issue were to be resisted."

62. Since the reasons the ET recused themselves were in large part a perceived issue about the conduct of Mr Allen QC at the Remedies Review Hearing, in our judgment it is unlikely that the Claimant unequivocally withdrew reliance on such allegations.

63. The conduct of counsel relied upon in support of the costs application was that referred to in paragraph 9(h) of the Claimant's statement of 3 March 2012: that Mr Allen QC behaved in an "aggressive, juvenile, disrespectful and condescending manner" towards the ET.

64. The witness statement referred to by the ET in the Recusal Judgment as indicating that the Claimant's complaints about Mr Allen QC's conduct were to be resisted was that of Mark Summerfield. The only passages in Mr Summerfield's statement which refers to the allegations regarding counsel's conduct are in paragraphs 19 and 20 in which he stated:

> **"19. Ms Aziz is critical of Robin Allen QC. In her statements she states that she has '*never seen a common criminal thug behave with such aggressive, juvenile, disrespectful and condescending manner towards the Magistrates, as Mr Allen did to the Tribunal*.' Ms Aziz also describes Robin Allen QC's conduct as '*beyond reprehensible*' and referred to what she considered to be his '*arrogance and excessively overt display of what he considered to be his superiority*'. I consider the use of inappropriate language in relation to one of the UK's most respected Counsel for employment, equality, discrimination and human rights as unnecessary and discourteous.**
>
> **20. I have spoken to my colleague, Gillian Stillwell, who attended the Review Hearing and she has advised me that in her view the criticisms made are inaccurate."**

65. The context in which such behaviour was alleged to have taken place was a contention by the Respondent that the EJ had withdrawn comments that the Respondent had misled the ET, the EAT and the Court of Appeal and a statement by the EJ that he had withdrawn such comments about one of their witnesses, but not about the Respondent generally. Further, it appears that there had been an exchange between Mr Allen QC and the EJ at the Remedies Review Hearing about the circumstances in which no reply had been sent by the ET to the Respondent's solicitors' letter of 15 July 2009 in which the alleged retraction had been referred to, and the issuing of the Remedies Judgment notwithstanding the comments in that letter.

66. We have considered whether the decision of the ET to recuse themselves was objectively sustainable on the basis on which it was taken. We recognise that Tribunals have a broad discretion in this regard, however that discretion must be exercised on objectively reasonable grounds.

67. The actual or perceived challenge to the credibility or personal conduct of the EJ was seen by him to arise from the conduct of counsel not instructed for the hearing from which the ET recused themselves. The relevant hearing took place three years earlier. Unfortunately litigants and even their representatives may make comments which are or are perceived to be offensive to courts or tribunals. Even if counsel appearing at the Remedies Review Hearing had challenged the integrity of the EJ as alleged, without more, that challenge, even if felt to be personally offensive, would not justify the EJ or the ET recusing themselves.

68. It appears that the EJ placed considerable importance in reaching the recusal decision on his belief that in determining the Claimant's application for costs he would have to reach a factual determination on the conduct of Mr Allen QC in which his credibility and that of the lay member of the Tribunal would be challenged. The ET held at paragraph 16:

> **"The panel's observations on the first day of this Hearing were only made after retiring at the end of the Claimant's evidence and before we had invited Counsel for the Respondent to cross-examine. The reasons for our intervention were: (a) the claim for costs involved, amongst many other matters, costs in respect of the Review Hearing in 2009 and, in pursuance of that application the Claimant specifically cited the conduct of leading Counsel on that occasion in relation to the Tribunal panel; (b) the Tribunal had noted in one of the respondent's witness statements words that seemed to suggest that the Claimant's contentions in this specific regard would be resisted (and in the event Counsel did not suggest otherwise but indeed confirmed his belief and reliance on that witness); (c) the Tribunal further noted that the witness in question did not seem to have been present at the material time whereas the Tribunal and the claimant most certainly had been; and (d) that the Tribunal recognised the substance of the claimant's complaint."**

69. The ET did not refer to the weight the Claimant attached to the conduct of counsel at the Remedies Review Hearing for the purpose of her application for costs. Nor did the ET set out

the passage in the statement of Mr Summerfield which they perceived would give rise to the challenge to their recollection of the behaviour of counsel at the Remedies Review Hearing.

70. The Claimant said before us as she had to the ET as is apparent from paragraph 11 of the Recusal Judgment that the allegations against Mr Allen QC formed a very small part of her claim for costs. It can be seen from the Claimant's Schedule of Costs which was before the ET that her claim for costs of the Remedies Review Hearing formed only a part of her overall claim. Further the principal contention in support of her application for costs of the Review Hearing was "wholly unjustified grounds for Review Application". The Claimant made allegations about the Respondent's counsel's conduct at the hearing.

71. The only evidential basis for the view of the ET that the Claimant's account of the behaviour of counsel at the Remedies Review Hearing would be challenged was the indication to that effect by Mr Algazy QC who was not present at the Remedies Review Hearing and the witness statement of Mr Summerfield who was also not present at that hearing. The relevant passage in Mr Summerfield's statement is:

> **"(ii) Alleged conduct of Robin Allen QC**
> **19. Ms Aziz is critical of Robin Allen QC. In her statement she states that she has '*never seen a common criminal thug behave with such aggressive, juvenile, disrespectful and condescending manner towards the Magistrates, as Mr Allen did to the Tribunal.*' Ms Aziz also describes Robin Allen QC's conduct as '*beyond reprehensible*' and referred to what she considered to be his '*arrogance and excessively overt display of what he considered to be his superiority.*' I consider the use of inappropriate language in relation to one of the UK's most respected Counsel for employment, equality, discrimination and human rights as unnecessary and discourteous."**

72. In our judgment there was no or no cogent factual basis for the conclusion of the ET that if, as they indicated, the Respondent contested the facts of Mr Allen QC's behaviour at the Remedies Review Hearing, the Respondent would be in direct conflict with the Tribunal. The Respondent was not going to adduce any direct evidence of what took place at the Remedies Review Hearing. The closest their evidence gets is the reported observation that "the criticisms

made are inaccurate". There was no statement from Ms Stillwell whose short observation is referred to by Mr Summerfield who was not present. Nor does Mr Summerfield state whether Ms Stillwell told him that Mr Allen QC did not make the alleged statements to the EJ or that he did but she did not regard them to be offensive.

73. If and insofar as the ET would have to determine what Mr Allen QC said and whether it was offensive they should do so on the evidence adduced by the parties. In our judgment on the basis of the material upon which the ET relied to recuse themselves they could not reasonably conclude that any factual dispute between the parties as to what was said by Mr Allen QC or whether it was unreasonable would have "drawn them into the dispute". They should reach a conclusion on these matters on the evidence.

74. In our judgment the basis on which the ET recused themselves was not well founded in law and on the material before them was one which no reasonable ET properly directing themselves could have reached.

75. The Respondent seeks to uphold the decision of the ET to recuse themselves on the ground that the conduct of the ET expressing certain strongly held views about the Respondent, their witnesses and their previous representatives was such that the test for apparent bias was satisfied. Mr Algazy QC accepted that the major plank of his argument rested on the ET's comments about Mr Allen QC.

76. The Respondent made their recusal application on the second day of the hearing, 18 December 2012. Mr Algazy QC told us that the application was a fresh application based on the events of 17 December 2012 at the ET. The recusal application was not made in writing. We were told by Mr Algazy QC that it was based on an allegation of apparent bias. It was said

that the vehemence of the feelings expressed by the EJ on that day gave rise to the application. The mindset of the EJ was that the ET were angered by the conduct of Mr Allen QC at the Remedies Review Hearing. It was said that the EJ went too far in his comments.

77. We have set out above the principles applicable to the test of apparent bias. In any case where there is a real ground for doubt, that doubt should be resolved in favour of recusal (**Ansar** paragraph 14.10, **Locabail** paragraph 25).

78. In the judgments given before the hearing on 17 and 18 December 2012 at which the recusal application was made, the ET had made some robust criticisms of the Respondent and some of their witnesses. The initial decision of the EAT to allow the Respondent's appeal from the Liability Judgment was overturned in the Court of Appeal which restored the decision of the ET. Lady Justice Smith at paragraph 67 shared the surprise of the ET that the Respondent contended that their disciplinary code had a meaning which it did not bear. The interpretation of the code had been the focus of the appeals by the Respondent to the EAT and the Court of Appeal. Lady Justice Smith also rejected the contention of their counsel that the ET's assessment of the Respondent's witnesses was deeply unfair. Lady Justice Smith held at paragraph 75 that she did not consider it to be so. The ET were entitled to reject the evidence of two witnesses of whom they had formed an unfavourable view. Notwithstanding the strongly expressed findings made by the ET, the Court of Appeal ordered that the case be remitted to the same ET for assessment of compensation. The adverse views the ET had expressed were not a bar to their adjudicating a remedy.

79. Whilst one of the grounds for appealing the Remedies Review Judgment was appearance of bias and included the criticisms made by the Respondent's counsel, Mr Allen QC, of the conduct of the ET, the appeal was not pursued.

80. In our judgment no appearance of bias arises from the findings of fact and conclusions reached by the ET in the judgments promulgated in decisions of the ET before the hearing in December 2012 nor from the conduct by the ET of the Remedies Review Hearing in 2009. Mr Algazy QC who appeared before us and who had also had represented the Respondent at the ET in December 2012, informed us that the recusal application was based on events on 17 December 2012. Rightly he did not rely on matters prior to that date. These did not give rise to an appearance of bias in the hearing of the Claimant's applications for exemplary damages and costs before the ET in 2012.

81. The Recusal Judgment at paragraph 17 sets out the views of the EJ of the Respondent's previous counsel's conduct. Mr Algazy QC put before us a note of the comments made on 17 December 2012 by the EJ. We consider the arguments advanced in support of the contention that the decision to recuse should be upheld by reason of appearance of bias on the basis of the account of the attitude of the EJ expressed in the judgment of the ET which we infer was articulated orally on 17 December 2012.

82. On the issue which led to the ET recusing themselves, the credibility of the Respondent's witness, Mr Summerfield, would not be in issue. As explained earlier in this judgment, his statement contained no material evidence regarding what Mr Allen QC said at the Remedies Review Hearing. Nor was Mr Summerfield in a position to assess the propriety of counsel's comments. As was recognised by Mr Algazy QC paragraph 14.11(c) of **Ansar** is not engaged.

83. Adverse comments about the Respondent and their witnesses in earlier judgments of the ET could not have been the basis of a recusal application for appearance of bias in 2012. Such

comments in the liability judgment had been endorsed by the Court of Appeal. A previous recusal application in the Remedies Review Hearing had been refused. Allegations of apparent bias in a Notice of Appeal from the Remedies Review Judgment of 2 November 2009 had not been pursued. There had been no hearings since that date until December 2012. Nothing new had occurred since the refusal of the ET to recuse themselves from the Remedies Review Hearing. In our judgment events before 17 December 2012 do not provide a basis for a recusal application on 18 December 2012 and were not relied upon by Mr Algazy QC.

84. It is said by Mr Algazy QC that on 17 December 2012 the EJ made adverse observations in vehement terms about the conduct of the Respondent's former counsel at the Remedies Review Hearing. That hearing took place three years earlier. It appears the EJ felt personally affronted by Mr Algazy QC's perceived challenge to his account that at the 2008 Remedies Hearing he had not withdrawn criticisms of the Respondent's witnesses and by counsel's apparent reluctance to accept his explanation of why no reply to the Respondent's solicitors' letter of 15 July 2008 had been sent. On 17 December 2012 the EJ was of the view, which he no doubt expressed, that in resisting the Claimant's application for costs the Respondent intended to "maintain the quite disgraceful allegations it made and has never withdrawn…"

85. The Claimant made it clear at the hearing in December 2012 that the conduct of Mr Allen QC at the Remedies Review Hearing in July and August 2009 formed one of a series of complaints against the Respondent. The ET will determine on the relevant evidence whether an order for exemplary damages and costs should be made. No direct evidence was to be placed before the ET by the Respondent as to what occurred at the Remedies Review Hearing. If counsel's conduct at that hearing was to be relied upon, it was a matter for the ET to determine on the evidence given at the hearing what occurred and whether and the extent to which that conduct is relevant to the Claimant's application for costs.

86. Personal attacks on judges and ETs do unfortunately occur. As was explained at paragraph 14.8 of the judgment of the Court of Appeal in **Ansar** and in **Bennett v Southwark LBC** [2002] ICR 881 per Sedley LJ at page 889 paragraph 19, courts and tribunals need to have broad backs. HHJ McMullen QC displayed such a broad back in the face of allegations against him by the claimant Mr Iteshi in **Iteshi v British Telecommunications plc** of "fraud, lack of credibility, evasion, dodging and failing to respond." He did not recuse himself.

87. In our judgment a fair-minded and informed observer would not consider that a difference between previous counsel and the EJ three years earlier, although still remembered by the ET with displeasure, would affect the just determination by the EJ of the issues in the applications by the Claimant for exemplary damages and costs. The ET themselves did not accept that they were biased nor that there was "any future potential for bias". In our judgment the ET did not err in so concluding. The relevant facts did not give rise to an appearance of bias.

88. In any event, if the views expressed by the ET about the Respondent's counsel's conduct at the Remedies Review Hearing crossed the "ill-defined line" leading to the appearance of bias or if there were real grounds for doubt whether it did, applying the guidance in **Bennett**, the ET should have taken steps to ascertain whether recusal could be avoided. The ET recognised that counsel's conduct at one hearing formed only part of the application for costs. If they were in doubt about its importance, they could have asked the Claimant what weight she attached to counsel's conduct before recusing themselves from this long-running litigation over which this ET had presided at so many hearings over a period of nearly ten years.

**Disposal**

89. The Claimant's appeal succeeds. The decision of the ET to recuse themselves is set aside. The Claimant's applications for a review of the Remedies Decision to seek an award of exemplary damages and for costs are remitted for determination by the same Employment Tribunal.