Appeal No. UKEAT/0225/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 June 2013
Judgment handed down on 16 August 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR D BLEIMAN

MR M WORTHINGTON

MS L MILLIN — APPELLANT

(1) CAPSTICKS LLP
(2) MR G HAY
(3) MR M HAMILTON
(4) MS A MORLEY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR CHRISTOPHER JEANS
(One of Her Majesty's Counsel)
Bar Pro Bono Unit

For the Respondents

MR ANDREW SHORT
(One of Her Majesty's Counsel)
Instructed by:
Capsticks Solicitors LLP
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SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

The Claimant, a practising barrister employed by a solicitors firm, was a litigant in person in her sex discrimination claims which all failed. In considering the claims, the Tribunal held that the credibility of the parties was central and found against the Claimant in three relevant respects based, in part, upon what she put in her written submission. There was no breach of the principle of equality of arms, the Respondent being represented by leading counsel, in holding against her what she had written in her submission. No other complaint of unfair treatment was made. The Claimant had a fair trial.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about sex discrimination and employment tribunal procedure. It is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondents.

Introduction

2. It is an appeal by the Claimant in those proceedings against a reserved judgment of an Employment Tribunal under the chairmanship of Employment Judge Mrs Martin sitting at London South over a period of seven days and a further two in chambers, sent to the parties with reasons and an appendix extending for 35 pages on 25 July 2011. The Claimant represented herself and the Respondents were represented by Mr Andrew Short QC, a factual distinction which looms large in this appeal. Today, the Claimant is represented by Mr Christopher Jeans QC giving his services for nothing. It will be said that this litigant in person appearing against leading counsel was subject to (unfair) inequality of arms which in itself is a ground for setting aside the judgment for there was not a fair trial.

3. The Claimant claimed sex discrimination and/or victimisation in roughly 27 separate complaints. The Respondents denied discrimination, alternatively advanced explanations where a *prima facie* case had been made and the burden shifted to them. The Tribunal dismissed all the claims. The Notice of Appeal has gone through a number of decisions in this court, so that what is now left is the product of case management and directions by respectively His Honour Judge Serota QC, His Honour Judge Peter Clark, myself, and a three-person Tribunal presided over by me. The net result is that this case is now very substantially refined, many grounds of appeal having been dismissed and taken no further. In particular, an

allegation of bias against the Employment Judge was abandoned on the Claimant seeing the evidence which she realised, or was advised, would stultify any such allegation.

The legislation

4. The legislation applicable in this case is rule 30(6) of the Employment Tribunal Rules which require an employment tribunal to give reasons. In practice, they should be such as provide to the parties an understanding of why they have won and lost bearing in mind that they will have heard the evidence and the submissions: see the postscript to the judgment of the Court of Appeal in **English & Emery Reinbold v Strick Ltd** [2003] IRLR 310 at para. 118.

5. Article 6 of the **European Convention on Human Rights** found in Schedule 1 to the **Human Rights Act 1998** provides as follows:

> **"Article 6 Right to a fair trial**
>
> **1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"**

6. We asked counsel for an extract from the Bar Standards Board Code of Conduct which regulates the conduct of barristers in court, so as to understand the point about equality of arms in this case. Counsel have jointly submitted to us the following extracts which they agree are relevant:

> **"Para 301 (a) A barrister must not engage in conduct … which is dishonest or otherwise discreditable to a barrister**
> **Para 302 A barrister has an overriding duty to the Court to act with independence in the interests of justice; he must assist the court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court**
> **Para 303 A barrister must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and to do so without regard to his own interests or to any consequences to himself or to any other person**
>
> **Drafting documents**
> **Para 704. A barrister must not devise facts which will assist in advancing the lay client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:**

(a) any statement of fact or contention which is not supported by the lay client or by his instructions;
(b) any contention which he does not consider to be properly arguable;
(c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud;
(d) in the case of a witness statement or affidavit any statement of fact other than the evidence which in substance according to his instructions the barrister reasonably believes the witness would give if the evidence contained in the witness statement or affidavit were being given in oral examination;

provided that nothing in this paragraph shall prevent a barrister drafting a document containing specific factual statements or contentions included by the barrister subject to confirmation of their accuracy by the lay client or witness.

…

Conduct in Court

708. A barrister when conducting proceedings in Court:

(a) is personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked;
(b) must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law;
(f) must not make a submission which he does not consider to be properly arguable;"

Counsel are agreed the Code contains no specific provisions governing the situation where a litigant in person is on the other side, so the general provisions quoted above would of course apply.

7. We say at once that there has been no criticism whatever of Mr Short QC for the way in which he conducted the proceedings. In particular the Employment Tribunal did not find that in his submission he made any assertion which was in breach of the above Code, or was held by the Employment Tribunal to affect the credibility of his clients, or indeed the credibility of the legal case he was making on their behalf. Nor has there been any criticism against these standards of the Claimant's conduct of her case given that she is a member of the Bar conducting litigation on her own behalf.

An overview of the case

8. By any standard this was a very large case. It lasted for nine days. The Tribunal had witness statements from all of the parties, the Claimant's extending to 57 pages, the other

witnesses being no more than nine. Because the Claimant insisted on reading her statement, all others did the same: see para. 12.

9. The Claimant's (closing) submission extended for 21 pages in dense single spaced typing. Her approach to the submission was as follows:

> **"13. Before making her submissions and after the Respondents had made their submissions, the Claimant told the Tribunal that she found it hard to listen to what the Respondents had to say about her, and that she had not wanted to give oral submissions but that the Respondents forced her to do so. She said this was indicative of the treatment that she had received from the Respondents during her employment.**
>
> **14. The background is that the Tribunal had hoped (based on an agreed timetable) that submissions would be given on 15th June 2011; however the Claimant did not finish her cross-examination in time for them to be made. The Claimant had suggested that written submissions could be given instead. The Respondents whilst preferring to deliver submissions orally was willing to provide written submissions. However it was the Tribunal that decided that it would prefer to have oral submissions so that it had the opportunity to ask questions about the submissions made to ensure that it clearly understood the case being put by both parties.**
>
> **54. Both parties gave written submissions. The Respondent presented its submissions orally. The Claimant did not want to go through her written submission and relied on the Tribunal reading it, however she did reply to the Respondent's oral submissions."**

10. The agreed list of issues comprised 19 paragraphs but this is deceptive, for almost every one had some subdivision, making a total of about 70 issues to be determined by the Tribunal. Prior to, at the start of and during the hearing, the Claimant raised issues which required the Employment Tribunal to make rulings. They were all against the Claimant: see paras. 6-15. The Tribunal expressly noted that the Claimant was "an experienced employment barrister with extensive experience of employment tribunals" when dealing with these applications and the issues raised by them.

11. The approach of an employment tribunal when dealing with such a complicated case is informed by the judgment in **Korashi v Abertawe Bro Morgannwg University Local Health Board Department** [2012] IRLR 4:

> **"31. …:**
>
> **(1) In a discrimination case "drastic pruning ... to exclude peripheral and minor issues from the list agreed by the parties" is required at the Employment Tribunal: St Christopher's v Walters-Ennis [2010] EWCA 921 at para 14 per Mummery LJ; and we take it *a fortiori* on appeal.**
>
> **(2) A Tribunal is under a duty to provide adequate reasons for its decision so that the parties and on appeal an appellate court can understand the findings and reasons: Meek v City of Birmingham District Council [1987] IRLR 250 CA; Greenwood v NWF [2011] ICR 896 EAT.**
>
> **(3) It is permissible for a Tribunal in giving its reasons to adopt a submission made orally or in writing by one of the parties: English v Emery Reimbold & Strick [2003] IRLR 710. This is particularly helpful where submissions are in writing and made by counsel.**
>
> **(4) The approach to an Employment Tribunal's reasons must be non-fussy, non-pernickety and must not be hyper-critical: Fuller v London Borough of Brent [2011] ICR 806 per Mummery LJ in the majority.**
>
> **(5) A judgment will not be struck down as perverse unless an overwhelming case has been made: Yeboah v Crofton [2002] IRLR 634 CA per Mummery LJ."**

That judgment was approved by the Court of Appeal: see [2012] EWCA Civ 451.

12. It will be quickly appreciated that the Employment Tribunal was faced with an enormous task in relation to the vast number of allegations made and the findings required of it. However, almost none of the principal findings in relation to each of the allegations forms a ground of appeal. The grounds themselves, of which seven are live, are neatly divided by Mr Jeans into those which relate to specific factual findings which Mr Jeans says are irrational, on the one hand, and an attack on the approach of the Tribunal for invoking in its decision making criticisms of the Claimant's written submission. This is said to be the denial to her of equality of arms constituting an unfair hearing.

The facts

13. In light of that eclectic approach we hope we can take a shorter route through the findings of the Employment Tribunal. The Tribunal introduced the parties to us in this way:

> **"28. The 1st Respondent is a firm of solicitors based in London Birmingham and Leeds. It has 13 partners, of whom a number are female and 300 employees of whom about 150 are lawyers. There are 30 lawyers in the Employment Department. There are various departments, including employment, property and clinical negligence. The fee earners in the**

Employment department are predominately female. There are a number of female partners. The 1st Respondent's work is predominately for pubic sector health authorities.

29. The Claimant joined the 1st Respondent on 17th September 1990, when it was a very small firm of 4-5 lawyers, as a barrister. The Claimant along with Mr Brian Capstick, the founder, set up the Employment group and also started doing Inquest work for the firms' clients. The Claimant was part of the Employment department.

30. In July 2006, Mr Gary Hay joined the firm and became a partner in the Employment Department. In June 2007 he became head of the Employment Department. On 1st April 2010 Mr Hamilton became head of the Employment Department. The Claimant was one of the people involved in the recruitment process for Mr Hamilton, and on appointment he occasionally did some work for her.

31. Ms Alison Morley joined the firm at about the same time as the Claimant on 5th November 1990. She became Head of Clinical Law in 2002 and Managing Director in 2007.

32. The Claimant undertook a large amount of advocacy and was absent from the office at court or Tribunal for long periods of time, sometimes 6-8 weeks and had a high workload. In addition to advocacy work, the Claimant had flies that she managed.

33. The Claimant became a salaried partner in 1996. She was involved in recruitment of solicitors whilst she held that position. However in or about March 2008 the Claimant and another salaried Partner, Mr John Brookes relinquished their salaried partnerships and became consultants. The change to the Claimant's status was as a result of discussions about her salary. As a salaried partner she was paid by a combination of salary and performance related bonus. However she wanted to have a fixed salary instead. This was agreed by Mr Hay on the basis that she became a Consultant (with salaried partner status) on a fixed income and concentrated on fee earning work rather than business development. This arrangement recognised that her strengths lay in her advocacy work and fee earning capability. Mr Hay wanted her to concentrate on these areas. The Claimant was the highest paid person at salaried partner level."

14. The Claimant was born in 1957 and was called to the Bar having a law degree in 1988 and practised until her appointment above. Her position in Capsticks was as an employed barrister.

15. Paragraph 34 contains a finding on the Claimant's evidence which is not appealed:

"34. By the time Mr Hay became Head of the Employment Department, the Claimant had assistance from Ms Vicky Watson (nee Heath). She also had assistance from Ms Jane Gilmour a senior solicitor, for two days a week and use of the department trainee. The Tribunal finds that Ms Gilmour assisted the Claimant but did not have her own case load. The Tribunal accept Ms Gilmour's evidence that the Claimant retained control of the files and that she was asked to do specific tasks such as draft instructions to Counsel and take witness statements."

16. The Tribunal then went on to consider the inquest work of Capsticks:

"36. The Inquest group is not a separate department. This came under the auspices of the Clinical Negligence department, headed by Ms Morley. Although the Claimant was in a different department she was heavily involved in Inquest work and did a large amount of advocacy and file management. Because of this and the fact that the Claimant was quite

autonomous in the way that she worked she was described as working in parallel with this group rather than with them.

37. Historically, the Heads of the Inquest group were the Claimant, Ms Janice Smith (from 2004), Peter Marquand (from about 2005) and then Mr Philip Hatherall (from 2008). The Claimant's complaints relate to the appointment of Mr Hatherall. There was no compelling evidence given as to why the Claimant ceased to be Head of the Inquest team when Ms Smith took over. The Claimant suggests that this was because Mr Hatherall who was then a solicitor in that group had sworn at the Claimant. There was no evidence to support this as being either true or being the reason that she did not remain the Head of the Inquest Group. The Tribunal concludes that she was not unhappy about Ms Smith becoming head of the Inquest Group. There is no record and there was no evidence given, that she complained about this at the time. The first reference is in a much later grievance to Ms Morley.

38. The Claimant was very unhappy that Mr Hatherall had been appointed Head of the Inquest Group. She complained that he was previously her trainee, and that as such she should not be expected to work for him.

39. *[deals with personal matters, omitted]*

40. The Claimant had difficulty in working with other members of the Employment Department There were several instances given in evidence which showed that various members of the team did not want to work with her and asked to be moved from working directly with her. Mr Hay gave evidence, which the Tribunal accept, that there were several instances of members of the team not wanting to work with her and where the Claimant made disparaging comments about them."

17. With those introductions made, the Tribunal descended upon the specific issues set out by the parties. Again, its approach is informed by this self-direction.

"25. The Tribunal has made the following findings of fact and has made its conclusions on the balance of probabilities having heard the evidence and considered the documentation. Inevitably, as this case involves disputes of fact the credibility of the witnesses that appeared before the Tribunal was in issue. The Tribunal's conclusions as to credibility are set out below in a separate section. The Tribunal heard a substantial amount of evidence. The Tribunal has made findings on what it considers to be relevant to the issues is has to decide. However, just because the Tribunal has not mentioned some evidence in this judgment it does not mean that the Tribunal has failed to consider taking into account any evidence given. The Tribunal spent 2.5 days in chambers and considered all evidence carefully."

18. The credibility issue is taken up at the end of the judgment in a number of paragraphs which we will turn to in due course. A short summary of pages 9-29 of the judgment, dealing with the complete list of issues, is that when dismissing the individual complaints, the Tribunal did so on the basis of findings which do not specifically allude to the credibility of the Claimant. In part this is due to its acceptance of the account given by the Respondents. In part it is due to an examination of the contemporaneous written records. And in part it is based upon an essential ingredient of the statutory tort being missing, or the burden of proof, if it shifted to the Respondents, being discharged by their explanation.

19. Mr Jeans in his skeleton argument at paras. 25-28 cites passages within paras. 44, 45, 52 and 53 which are said to be based upon the Tribunal's view of the Claimant's credibility. It is true that in some of those the Tribunal records its preference for the evidence of a Respondent over that of the Claimant but insofar as, for example, paras. 44.1, 45.2, 52.21 and 52.5 are concerned, there are other reasons why the particular claim failed. There is therefore substance in Mr Jeans' submission that some of these decisions, albeit a very small number, have been made by reference to the Tribunal not accepting the Claimant's evidence and accepting the Respondents'. For the rest, there is substance in Mr Short's submission that the matter did not have to be decided on the basis of the Claimant's credibility.

20. The Tribunal did not define what it meant by credibility. From a commonplace point of view, it can mean a failure to tell the truth. But the Employment Tribunal's approach is, we think, correctly summarised by Mr Short's taxonomy of its findings coming from: inconsistency of the Claimant in the documentation and the evidence she gave orally; inaccurate portrayal of evidence given by others; and unreasonable characterisation of events. Mr Short is right when he contends that a Tribunal is entitled to take account of the Claimant's recollection of a piece of evidence given in the hearing two weeks earlier, when it considers her account of an event four years earlier. Credibility in the sense used by the Employment Tribunal in this case does not come from any specific finding that the Claimant was telling lies, an extreme example of lack of credibility. Rather, we consider, the Tribunal found her unreliable in the accounts she gave of various events where there were other witnesses to the event, or to its categorisation and depiction. The Tribunal went with the Respondents' accounts, all of whom it found credible.

The findings on credibility

21. We agree with Mr Short that a finding on credibility is one of fact, and with Mr Jeans' caveat that it must be supported by logical and reasoned findings. We take that to mean findings on the whole of the material. We have thought carefully about how to present the deconstruction of the Tribunal's reasons on credibility by reference to the arguments put by respective counsel, the judgment and the detailed evidence including the Employment Judge's notes. We find it necessary to do this notwithstanding that ultimately the task of the Employment Tribunal, and ours on appeal, is to see that there was a fair trial and to consider the whole of the Tribunal's judgment in accordance with the citation from **Korashi** above.

22. The Employment Tribunal began its chapter on credibility thus:

> **"56. Inevitably in a case of this type, the Tribunal has had to make an assessment of the credibility of the witnesses it heard from.**
>
> **57. The Tribunal found the Respondent witnesses all to be credible and consistent. In particular, the Tribunal found the evidence from Mr Hay to be measured and believable. All the Respondent witnesses were able to give consistent and reasonable explanations about what happened. Whilst the Tribunal does not find that the disciplinary process was perfect in that the letter inviting the Claimant to the disciplinary hearing should have been clearer, and that the appeal could have been handled differently, it was however clear, to us that the Claimant understood that she had to answer disciplinary charges and what they were. Whilst the Respondent does not accept that the process was fundamentally flawed, it does recognise that it could have handled the situation better. This acknowledgement goes further to the credibility of the Respondent witnesses.**
>
> **58. The Tribunal finds that the Respondent's evidence was consistent with its response and believable."**

23. The above findings are not challenged on appeal. They contain criticisms of the Respondents but they are not challenged by the Respondents either. The three individual Respondents gave evidence and three further witnesses, all solicitors, two of whom were partners. All were held to be credible.

> **"59. However, the Tribunal does not find the Claimant to be a credible witness. There are many instances of inconsistency in both her documentation and the evidence that she gave. It is not possible to give each and every instance."**

24. The second and third sentences are not challenged on appeal. Plainly there is a challenge to the finding that the Claimant was not credible. It is accepted by both counsel that the finding as to credibility of a witness is one of fact, but it must be logical and reasons should be given when finding a witness not to be credible. However, what is important about the second and third sentences is that the Tribunal noted inconsistencies in the Claimant's documentation which is the material she produced in writing at the hearing and we take it prior to her written submissions, and of course her witness statement and her cross-examination (re-examination probably not being useful here). Had the judgment ceased at this point it would have been unassailable. Throughout the 20 pages of findings on each of the Claimant's claims there is a reasoned rejection of it. The Tribunal has in going through them pointed out the inconsistencies in the evidence given both orally and in writing. On the basis of that material, the Tribunal was entitled to hold that the Claimant's account was not credible, in that it could not rely upon it.

25. It moved to the next level:

> **"60. The Tribunal spent some time reading the Claimant submissions which were detailed and lengthy. The Tribunal compared what she wrote with the evidence that was before the Tribunal. The Tribunal referred to the written documentation and its own notes of the evidence given. There are many instances where the Claimant's submissions do not accord with the evidence."**

26. The above paragraph represents the introduction to the vice asserted in this case based upon unequal treatment of the parties. The way in which the Tribunal relied upon the Claimant's submissions to hold against her is the subject of a separate challenge to which we will return. Nevertheless, the Tribunal is here giving examples where the Claimant's submissions do not accord with the evidence.

27. As we approach the following paras. 62-73 we bear in mind the holistic approach which needs to be taken, and Mr Short's submission that the unchallenged findings or the findings

which are no longer the subject of an appeal must be weighed with the paragraphs which are criticised.

> **"61. For example, in paragraph 6i of the submissions, the Claimant is referring to the evidence of Mr Marquand. She states that he said in evidence that he had to obtain the permission from Ms Morley to appoint Mr Hatherall as Head of the Inquest Group. However, the Tribunal's record shows quite clearly that Mr Marquand said that he did not have to obtain Mr Morley's approval; rather that he just told her what he had decided."**

28. This ground was dismissed at the preliminary hearing and there was no further appeal. This shows the Tribunal has faith in its own account and that the Claimant's submission is at variance from the evidence which it took.

> **"62. The Claimant states in her submissions that Mr Marquand said he knew that Mr Hatherall had sworn at her in the past and that he had spoken to him about this. However this is not what is in his witness statement, nor what he said in cross examination."**

29. It is conceded by the Respondents that this is an error. It follows that Mr Jeans is correct that the Tribunal has made an irrational finding.

> **"63. In paragraph 6ii, in relation to Mr Edwards' evidence, the Claimant says Mr Edwards agreed that the Claimant acted as his deputy, however his evidence is that she would sometimes deputise for him, but was not his deputy in any official sense. This is misleading."**

30. The Tribunal's criticism here is that the Claimant's account is misleading. Mr Jeans contends that this is unfair and extraordinarily careless by the Employment Tribunal. We have examined the three or four places where this matter is alluded to in the evidence together with the Judge's note. In our judgement, the Employment Tribunal cannot be criticised for the way in which it has put this, in that the Claimant was not in an official sense allowed by Mr Edwards to act as his Deputy. This may be a pernickety approach but the capitalisation of Deputy is used in the evidence. It is correct to note there was no formal designation of a Deputy and the Tribunal's assessment was that the Claimant sometimes deputised for him but was not his

deputy in an official sense. This we hold is a correct finding on the evidence, and does not depend directly or alone on the Claimant's submission. The Judge's note is clear and supports the finding.

> **"64. In 61v, in relation to Mr Hay's evidence, the Claimant says that Mr Hay was taken to page 95 in the bundle. However, Mr Hay (nor any other witness) was not taken to this document.**
>
> **65. She also states in this section that Mr Hay for the first time in evidence named the HR advisor who was party to the Hello magazine comment. This is incorrect as his notes made at the time of the Claimant's complaint state the name of this person."**

31. Grounds of appeal relating to these two paragraphs did not survive the preliminary hearing. It is important to note that the Tribunal is holding against the Claimant's account of evidence she gave or her presentation at the Tribunal (paragraph 64) and her challenge to contemporaneous notes made by Mr Hay.

> **"66. The Claimant states in her submissions *'Mr Hay confirmed that the Claimant had raised the matter of problems at the Employment Tribunal with KA and the fact that she had emailed the HR advisory Team Head, Darren Skinner to inform him that there may be a complaint by one of the witnesses regarding advice given by HR'*. However, in Mr Hays witness statement, paragraph 37 he denies this, and maintained this denial in cross examination."**

32. The problem with this paragraph is that paragraph 37 of Mr Hay's witness statement does not contain such a denial. We do not know whether anything was said by him in cross-examination for there is no Judge's note on this. In other words, this was a ground of appeal and could have been the subject of an application to the Judge for her to produce her note and it was not. Mr Jeans contends that the Employment Tribunal is at cross purposes and to find against the Claimant on credibility is irrational and grossly unfair. We have to say that we have not had much help from either counsel on this point. If one reads on in the Claimant's submission there is an indication about the timing of the knowledge of Mr Hay about KA's complaint. The Claimant is relying on an email she sent to Darren Skinner. In the text of her submission she says "(email not in bundle)" but the substance seems to be that the Claimant had

appeared to head off a complaint by KA about the Claimant's performance at the Employment Tribunal, where she was their advocate, with HR before a relevant time and it is this which Mr Hay is denying. The Claimant resists this depiction but it is correctly cited as such in para 52.12 and the appended agreed chronology. In paragraph 37 of Mr Hay's witness statement he talks about a copy of "the client's email to [Martin Hamilton]" and he, Mr Hay, was not involved until May 2010. Given there was no request for the Judge's note about this, it seems tolerably clear that Mr Hay did deny in evidence that the Claimant herself had raised the problem of her performance at the Employment Tribunal which was the complaint by KA. If that is correct, there is no error or irrationality in paragraph 66.

33. It follows from our examination above that only one of the six complaints made by the Claimant about these findings is upheld. This is the conceded error in paragraph 62. Paragraphs 61, 64 and 65 did not survive the preliminary hearing. Paragraphs 63 and 66 on our holdings are of no substance. That leaves simply paragraph 62 and with it the criticism relating to inequality of arms in the treatment of submissions. The submissions do not arise in the passages which we analyse from now on.

> **"67. The Respondents challenged the Claimant's credibility in submissions. The Respondents said they did not do so lightly. During her evidence the Claimant made reference to documents that were not in the Tribunal bundle. The Claimant had not requested or produced these documents. For example the Claimant would refer to a note book where she made a note of discussions with clients when she was out of the office. These notebooks are in the Claimant's control; however she did not produce them at any time during the tribunal process. The inevitable conclusion is that these documents in fact do not exist and the Claimant was merely trying to deflect criticism of her by reference to these documents."**

34. This finding is criticised on the basis that it is unfair because points were not put to the Claimant in her evidence. The inference that the documents she cited did not exist was unfair. It had never been asserted by the Respondent that the notebooks were in her control. This is a serious allegation which should have been put to her: see **Aberdeen Steak Houses v Ibrahim** [1988] ICR 550 at para. 557. Mr Short concedes that it was not put to the Claimant that she had

her blue notebooks at home at the relevant time but the chronology is important. The claim form in this case was in existence for a substantial period of time before she left – 6 months. The Tribunal notes the alternative propositions that the Claimant had neither requested nor produced these documents. Plainly if she had them in her control she could be criticised for not producing them. But in our judgment, Mr Short is correct when he points to the reference to 'during the Tribunal process' as including a request by a serving employee that documents, within the possession of the Respondent during her career which is still continuing up to the date of the claim form and thereafter, should be made available. It will also be noted that this paragraph deals with the written submission of the Respondents that the Claimant's evidence was not credible and it was a necessary response to that. We see no error in paragraph 67 above.

> **"68. In the bundle of documents were notes of the disciplinary meeting that Mr Hay had with the Claimant. These were his handwritten notes in a bound notebook. The Claimant alleged that these notes were fabricated. Mr Hay produced the original note book. He gave a credible explanation about how the note was made including that his pen ran out and that he was pressing hard on the paper to try to make it write. On the photocopy it appeared that there was a blank space in the notes. The originals confirm his explanation. The Tribunal find that these notes were genuine, however even having seen the original notes (which run in chronological order) the Claimant did not concede this point."**

35. The key point about this finding is that a very serious allegation was made by a member of the Bar employed as such by a firm of solicitors against a leading partner of the firm. Mr Jeans in his oral submissions sought to contend that this allegation of fabrication had not been made by the Claimant but given that there was no ground of appeal on this, the Claimant must accept the finding by the Tribunal that she did make an allegation of fabrication of an attendance note. This matter was dealt with comprehensively in the Employment Tribunal's findings based upon an examination of the original notebooks of Mr Hay. That was a finding of fact open to it from an examination of those materials. Particularly telling is the sequence of the entries made in those notebooks which place the relevant meeting in context. It is perfectly in sequence. In our judgment, had the Tribunal not uttered the second part of the last sentence

in this paragraph (about concession) this finding would have been unimpeachable. An allegation of fabrication was made, there was no substance to it. The Tribunal accepted Mr Hay's account supported by the contemporaneous documents.

36. The criticism is however is that she did not concede this point. We agree with Mr Jeans that it may be harsh to criticise the Claimant for not seeing the wood for the trees, for not seeing the obvious when it was presented to her at the hearing. What it does illustrate is the Claimant pressing on with a hopeless point. We see from the extract from the Bar Code above that a point cannot be put by a barrister if there is no substance in it. This is not a matter to do with equality of arms for we hold that a litigant in person or a barrister who pressed on with a hopeless point would have been subject to criticism. Given the allegation is one of fabrication, had a barrister been making it, once that evidence had been given a dim view could have been taken of his client and indeed, of the remainder of his submissions if he showed such poor judgment in pressing ahead with a point which was so hopeless. Given the Tribunal focused earlier in its findings on submissions, and there is no mention of submission here, we conclude that the failure to concede the point was made in respect of the Claimant's pressing on having seen the original notes during the course of the preparation of the case. This ground has no substance.

> **"69. The Claimant alleged in her ET1 that Mr Hamilton demanded that she meet him in London at 5:30 when she was in Horsham at an Inquest. Mr Hamilton's email is set out at paragraph 52.19 above. The Tribunal find this to be an innocuous and polite email, and was not in anyway offensive. The Tribunal can not see how the Claimant could consider this to be offensive as her interpretation is contrary to the words of this email.**
>
> **70. The Claimant alleged that an email from Mr Hamilton dated 24th July 2008 was an example of him being rude and discourteous. She said that Mr Hamilton *'showed his true colours'* by this email. This was an email set [sic] to all members of the Employment Department and not just to the Claimant The email reads: *'Just a reminder that Elaina, as a trainee, comes under my supervision and that in the transition to her forthcoming qualification when she will be staying on in the department, she will be my assistant and I am in the process of building up her work accordingly. I appreciate that in this interim time until we have another trainee in September fee earners do need access to Elaina, but it would be helpful if you could let me know if you are proposing to give any significant bits of work to her so that we can plan accordingly'*. In cross examination Mr Hamilton said *'I was her overall supervisor, she did not just work for me. My responsibility was to ensure she had an appropriate and balanced case load'*. The Tribunal can find nothing in this email to suggest that Mr Hamilton was rude and**

discourteous to the Claimant. It is an entirely innocuous email sent to all members of the team. The Claimant is reading into this document matters that are simply not there."

37. These two paragraphs are unchallenged. They contain the Tribunal's rejection of the Claimant's misappreciation of ordinary correspondence, itself entirely innocuous, and of the Claimant's reading what she wants to read and, we might add, hearing what she wants to hear. It is important to stress that the last sentence is unchallenged. It is just one of a number of examples of the Claimant's characterisation of events.

"71. The Claimant made a point during the hearing of emphasising her seniority and experience. She said on several occasions that the Respondent wanted to get rid of her because she was a high achieving female barrister. This simply does not make sense. If the Claimant was as high achieving as she maintained the Respondent would want to keep her rather than get rid of her. Also during the hearing the Claimant would make reference on several occasions to other solicitors' being 'junior' in comparison to her. Her comments about KA being a junior agency worker were demeaning to KA given that she clearly held a responsible position with the client's organisation and was pivotal to the relationship with the Respondent. The Claimant's comments during the hearing gave credibility to the Respondent's evidence.

[…]

73. The Claimant feels aggrieved that despite her being one of the highest fee earners in the firm and achieving good results for clients, that she did not progress at the firm as she felt that she should have done given that she was the most experienced lawyer in the Employment Department except for Mr Edwards. She clearly is aggrieved that trainees and solicitors that she recruited have been promoted in a way that she considers to be over her. This again illustrates the Claimant's feeling of superiority over her colleagues. This is also despite her agreeing that in return for a fixed salary with no bonus, that she would relinquish her salaried partnership status, and concentrate on fee earning work rather than client development. Client development is clear1y something all partners had to undertake."

38. We will take both these together. We accept the proposition advanced by Mr Jeans that it is illogical to say that because the Claimant was seen as a high achiever the Respondent will want to keep her rather than get rid of her. It is as illogical as saying that an employer who has employed a black person would not discriminate against her having made the original decision. Yet of course the law is replete with cases of people who discriminate against those who they have already employed. But the thrust of these two paragraphs is the self-perception of the Claimant as to her worth. The issue in this case is the Claimant's perception as to her being the victim of sex discrimination, whereas the material she adduces relates to her position as a barrister standing out from solicitors, and not as a woman. Having heard this case over seven

days the Employment Tribunal was in our view entitled to make a comment about the Claimant's self-perception as a high achiever and her relative position in the hierarchy of lawyers in the firm. We do not consider the Tribunal can be criticised as a matter of legal error for the comments in these two paragraphs.

> **"72. The Claimant raised a grievance but decided not to proceed to the second stage of her grievance as she felt that the Respondent took steps to put right the matters that she was complaining of, namely not having any junior support, and not receiving invitations to meetings/seminars etc. This was on 9th February 2009. On 13" February 2009 she received a letter from Alison Morley confirming that that these matters had been resolved. However, the Claimant is now seeking to raise these allegations again despite her clearly saying that they had been resolved."**

39. This paragraph is unchallenged. It indicates that the Claimant having once resolved a matter will not let it go. The Tribunal was entitled to take a view about the Claimant pressing on with a matter which should have been behind her. This too is a matter which the Employment Tribunal was entitled to say affected the confidence it had in the evidence she gave.

40. Standing back from the whole of that process, it is plain that the Tribunal made an error in one paragraph (62) and no error in the remaining 16 paragraphs which it cites as the basis for its finding on credibility, both of the Respondents and of the Claimant. Taking the correct approach set out in **Fuller v Brent** (above) of not being pernickety, not only would it be pernickety but it would be wrong to interfere with the judgment of this Tribunal in respect of its single error of fact in paragraph 62.

Equality of arms

41. Our decision above is subject to Mr Jeans' argument on equality of arms. We make one simple response. On the findings, Mr Short made no submission the rejection of which was *capable* of reflecting on the credibility of any of his clients. We do not know what the

Employment Tribunal would have done if he had. The Claimant did make submissions which the Employment Tribunal rejected and were held not to be credible. For this ground of appeal to succeed there must be some actual not hypothetical comparison. We are looking to see if there was any specific aspect of the trial which occurred and made it unfair. If leading counsel made an irrational submission of fabrication (see below) yet the Employment Tribunal did not on grounds of credibility hold it against his client (or against him when considering his other submissions) a true comparison of treatment could be adjudicated. This point was not fully developed before us and so we go on to consider the principal contention, lest we are wrong.

42. On a narrow view since we hold that the Claimant's submission was held against her in respect of only one finding (paragraph 62), it is not sufficient to overturn the judgment as a whole. If we are wrong on that or wrong on paragraphs 63 and 66 which are based upon her submission, yielding a total of three out of 17 findings on credibility made against the Claimant, we will give our view on the argument.

43. The most succinct statement of the law is given by Lord Hope in his speech in **Porter v Magill** [2002] 2 AC 357 at paragraph 87:

> **"87. The protection which Article 6(1) lays down are that in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…. I consider that this sentence creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights to the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public…"**

44. In his speech in **McLean v Buchanan** [2001] 1 WLR 2425, given slightly earlier than that in **Porter v Magill**, Lord Hope dealt specifically with one aspect of the right to a fair trial in the following way:

> **"39. The principle that there must be an equality of arms on both sides is clearly established in the jurisprudence of the Strasbourg Court: see *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, paragraph 33. What this principle requires is that there must be a fair balance between the parties. In civil cases the accused must be afforded an opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with his opponent: *De Haes and Gijsels v Belgium* (1997) 24 EHRR, 1, paragraph 53. In criminal cases the requirement that there be a fair balance is no less important. As I said in *Montgomery v H M Advocate* [2001] 2 WLR 779, 809D-E, however, the purpose of article 6 is not to make it impractical to bring those accused of crime to justice. It does not require the matters with which it deals to be resolved with mathematical accuracy. The essential question is whether the alleged inequality of arms is such as to deprive the accused of his right to a fair trial."**

45. It is common ground before us that the reference to the 'accused' is apt in its application to a party in a civil dispute.

46. Returning to **Porter v Magill**, we find Lord Hope giving approval to the adjustment of the law on unfairness in the following terms:

> **"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and the informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased." [102]**

47. It follows that the complaint that the Tribunal did not afford equality of arms constitutes an allegation that it was biased against one party or in favour of another: it did not treat the parties fairly and evenly. It also follows that the trial must be looked at as a whole. While the rights guaranteed by Article 6(1) are separate, Mr Short is correct when he submits that one cannot "siphon off" equality of arms but must consider it within the context of the trial as a whole. It is common ground that the impartial tribunal is 'under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties without prejudice to its assessment to whether they are relevant…': see **Kraska v Suisse** ECHR 90/1991/342145 at para. 30. Further, Mr Jeans submits that the rules of natural justice as defined by the Privy Council in **Mahon v Air New Zealand** [1984] 3 WLR 884 in the advice given by Lord Diplock on behalf of the Board is particularly relevant at 896:

> **"The rules of natural justice that are germane to this appeal can, in their Lordships' view be reduced to those two… The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.**
>
> **The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the findings, if it be disclosed, it not logically self-contradictory.**
>
> **The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result." [emphasis added]**

48. The point Mr Jeans emphasises is that a Tribunal must present it reasons and its findings which show its decision-making on rational grounds. It is clear from the passage emphasised that relevant evidence must be listened to fairly. Thereafter, a submission upon it which does not contain a rational argument does not invoke the same requirement of respect as one which is based upon rationality. This aspect of the appeal is entirely about what is said to be the differential treatment of the written submissions of the Claimant as a litigant in person as against those of Mr Short. In simple terms, it is argued the Tribunal would not hold it against Mr Short's four clients if he were to make inaccurate submissions about the evidence or if he were partisan, whereas the Claimant had it held against her that her submissions fell into this category.

49. At first sight, this case makes for an unpromising testing ground for this point, upon which there appears to counsel to be no authority. The Claimant joins the sizeable number of appellants to this court and to the Court of Appeal who are memorably described by Rimer LJ, upholding my judgment in **Kennaugh v Lloyd Jones** [2013] EWCA Civ 1 in the following terms:

> **"17. The applicant also informed me that he regarded the employment tribunal as having been biased against him. That was, as I followed it, apparently because the tribunal generally preferred the respondent's evidence to his.**
>
> **18. Assertions by self represented litigants of judicial bias are tediously common. They are rarely founded on anything that might be said to amount to supportive evidence…"**

50. There was originally in the present case a straightforward allegation of judicial bias but this was very properly abandoned by the Claimant before the full hearing. It thus falls into the category of cases which I cited in **Whyte v Lewisham** UKEAT/0256/12 where disappointed litigants raise unfounded allegations of judicial bias and withdraw them before the hearing. Given the disposal of that single point, what makes this case unusual, and different from the tediously common cases noted by Rimer LJ, is that there is not a single complaint about the handling of the case prior to receipt of the reserved judgment referring the Claimant's written submission. There is no criticism whatever of the Tribunal in its conduct and management of the trial, nor of the pre-trial process, nor of Mr Short. In particular, it listened fairly to her evidence and that of the Respondents before considering her submission on it.

51. The second reason why this case might appear unpromising is by reference to the personalities. All the Respondents were solicitors and chose to be represented by leading counsel. That is hardly surprising. The Claimant herself could not have been in a better position to represent herself given that she was a practising barrister specialising in employment law before these tribunals. She was in an even better position than the claimant in **University of Westminster v Bailey** UKEAT/0345/09 who, despite having five postgraduate degrees and lecturing in HR, was credited, as a litigant in person, with the usual difficulties of such a person such as stress and solipsism and, in his case, unfamiliarity with the practice of employment tribunals. The fact remains, no matter how experienced she was, Ms Millin was a litigant in person.

52. We have not been addressed by counsel on whether the fact that she is a practising barrister in any way restrained her conduct in court (which is not an issue) or the way in which she made her written submission (which is). We do not know if the Bar Code applies to a barrister who is a litigant in person. We will proceed on the basis that Mr Short was bound by the Bar Code but the Claimant being a litigant in person was not. That clearly is the implication of the Tribunal's approach to the treatment and presentation of the written submission. As we have recorded above, it was the Claimant's choice that she did not address her written submission in open tribunal, but simply replied to points made by Mr Short. This therefore put the Tribunal at a disadvantage for it was not able to engage in the normal debate which would occur between counsel and the bench, for example, probing matters in a written submission which to the Tribunal would appear unarguable in the light of the evidence heard. That process would give the opportunity to the advocate to see which way the wind was blowing, and to withdraw or to put more lightly points which had no substance in the light of the evidence. The Claimant, because she eschewed such challenging debate, was exempt. We cannot see that such an approach if it were taken by counsel would be indulged. The only place the Tribunal *could* express its view about the Claimant's submissions, for example the fabrication point in paragraph 68 of its judgment, was in its judgment, the Claimant not affording the Tribunal the opportunity to ask her questions itself.

53. The essence of this ground of appeal is that the right of a party to make submissions includes the right to be partisan and to make irrational arguments without adverse consequences to her case. If a submission is made by an independent advocate it is not held against his client, on grounds of credibility, that he makes a partisan comment or takes a view of the evidence which favours his client rather than his opponent. It is contended that a fair tribunal will not equate an advocate's submission about the evidence (whether the submission is well judged or not) with the credibility of his client. The proposition is that if an unrepresented party is

disbelieved because of her submissions, she is being treated less favourably than a represented party who is immune from such conclusions because he 'enjoys the buffer of a representative'. Mr Jeans further submits that the Tribunal needs to remind itself of the special position of the litigant in person before drawing adverse conclusions. The litigant in person does not enjoy the 'advocate's licence'.

54. The professional rule affecting this case appears to be derived from the passage on conduct in court, para. 708 from the Bar Code, which provides that a barrister must not make a submission which he does not consider to be properly arguable. Similarly, under rule 704(d) a document may contain specific factual statements or contentions provided they are confirmed as accurate by the lay client or a witness. Plainly paragraph 704 has no application to a litigant in person who does not have a client but she may have a witness. It is to be inferred from the Claimant's submission that she is entitled to put forward contentions which are not confirmed as accurate by a witness. As it happens, she called no witness in this case but the principle is the same. Similarly, she may make a submission which is not considered by the Tribunal to be properly arguable, objectively. In this case, one assumes that the Claimant considered her submissions to be accurate and properly arguable; and so on this footing it is not a disadvantage when compared with counsel.

55. If the Claimant had been represented by counsel, he would be entitled to put forward for example the claim that Mr Hay had fabricated an attendance note. Evidence would be given by the contending parties. He would be entitled to maintain that submission in the light of the evidence but only if he considered it to be properly arguable. If the Tribunal had in front of it the Bar Code, it would be entitled to infer that that was the subjective judgment of counsel, absent any allegation of breach of the Code. Since in the Tribunal's view the evidence was completely one way, the point is not properly arguable. It would be entitled to criticise counsel

for making that submission, and to find unreliable any other submission he made given his approach to the blindingly obvious. Possibly, since ultimately the points he makes are based upon his client's instructions, the Tribunal might be entitled to hold it against his client for requiring him to maintain a written submission which was contrary to the obvious evidence.

56. Turning to the Claimant's position as a litigant in person, she presented her written submission in the third person, as was she did her claim form. It is usually the case in the experience of this court, that litigants in person do not fully understand the boundaries between the giving of evidence, the putting of a point in cross-examination and the making of a submission. Yet this Claimant did. Had she attended at the Employment Tribunal in the normal way for the purpose of presenting her written submission and being asked questions by the bench, there could have been no objection in principle to her being taxed as to her unreliable memory of the evidence two weeks earlier. Just the same would happen to counsel.

57. In our judgment, the solution to this ground of appeal is that if the Claimant had advanced in her witness statement or oral evidence a proposition that was not credible the Tribunal could hold it against her. If she continued to make the point in her closing submission the Tribunal could continue to hold it against her. Counsel is bound by professional rules as to what he can say and do, but the litigant in person is not. But if the litigant in person does something that is not available to counsel, which is to put forward a wholly unarguable point, there is no breach of the right to a fair trial if the Tribunal finds her not to be reliable or credible in putting forward such a contention.

58. We return to the proposition advanced by Lord Diplock in **Mahon** (above). A tribunal having listened fairly to the evidence of a party does no disservice to a submission which is not rational if it dismisses it, or if it finds the party putting it forward in person is not credible.

59. We reject the contention that the Tribunal had to remind itself that the Claimant was a litigant in person: it made this clear in its judgment and in the citation of the representation. It was obvious she was a litigant in person. She was as a matter of fact treated differently and, we hold preferentially, in the way in which the written submissions were presented, for Mr Short had to make his presentation orally whereas the Claimant was excused. Further, the vast majority of the 70 or so issues which were put before the Tribunal were decided against the Claimant by reference to material other than a straight conflict of evidence as between the Claimant and one or other of the Respondents. The Claimant did not lose this case because of three findings on credibility.

60. In conclusion, we do not accept the proposition advanced by Mr Jeans and we hold that a tribunal may hold it against a person's credibility that she has put forward in a submission to the Tribunal something which is irrational or inaccurate. But if we are wrong about that in the context of this case it will be recalled that only three paragraphs out of 17 in the credibility chapter are subject to a finding which includes criticism of the way in which the point was made in submission. Looked at as a whole in relation to the issue of credibility, which we accept was found by the Tribunal to be critical, these three paragraphs do not condemn the whole judgment to a finding that there was an unfair trial. The Claimant lost this case comprehensively.

Disposal

61. The appeal is dismissed. Subsequent to the events in this appeal, the Claimant resigned and has brought a claim for constructive unfair dismissal which was dismissed and which on appeal is stayed pending the outcome of this appeal. Further, an award of costs was made against her and an appeal against that too is stayed. By consent of the parties I will now conduct the sift of these two appeals.