Appeal No. UKEAT/0303/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2012

Before

HIS HONOUR JUDGE McMULLEN QC

MS K BILGAN

MR M WORTHINGTON

---

(1) MR J B HEALEY
(2) MR L M STONE (FORMERLY KNOWN AS MR L M JOYCE) APPELLANTS

WINCANTON GROUP PLC RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2013

APPEARANCES

For the Appellants	MR JOHN HEALEY (The First Appellant on behalf of both Appellants)
For the Respondent	MS REBECCA EELEY (of Counsel) Instructed by: Hill Dickinson LLP 1 St Paul's Square Liverpool L3 9SJ

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

In 1998 the Employment Judge heard and dismissed a claim brought by a former client of his. He did not know the connection at the hearing but did before the Judgment. The EAT upheld the Claimant's appeal on the ground of appearance of bias. The Judge should not have heard the case or continued with it after actual knowledge.

In 2011 the same Judge heard and dismissed most of the Claimant's new case, where he represented three others. He did not remember the connection. The Claimant did, but said nothing as he did not know he could apply to the Judge. When he saw how counsel for the Respondent did this in a subsequent hearing before a different Judge, in between the hearing and the reserved Judgment, he did not know he could at that stage seek recusal.

EAT held an informed observer would see a real possibility of bias. Although the connection was old, the Claimant was not merely a former client, but a litigant who had successfully challenged the Judge on bias.

He did not waive his right to complain. His evidence was accepted. Entire Judgment set aside and case sent for fresh hearing.

HIS HONOUR JUDGE McMULLEN QC

Introduction

1. This case is about the appearance of bias by an Employment Judge. The Judgment represents the view of all three of us called to this case for our diverse specialist experience and in the unusual proceedings to make findings of fact at first instance on the allegations of apparent bias, and to give an opinion on what a litigant should do about challenging a judge. We will refer to the parties as the Claimants and the Respondent.

2. It is an appeal by the Claimants in those proceedings against a Judgment of an Employment Tribunal chaired by Employment Judge Robinson at Liverpool sitting over six days, sent with Reasons on 23 November 2011. There were five Claimants. Today Mr Healey represents himself and Mr Stone, the others having dropped out of the proceedings. Mr Greaves, one of the Claimants, was represented by counsel, but Mr Healey represented the others, and the Respondents were represented by Mr Northall of counsel. Today, the Respondent is represented by Ms Rebecca Eeley of counsel.

3. The Claimants made a number of money claims against the Respondent, and, broadly speaking, they lost more than they won, many of their claims having been dismissed. As to the part that they succeeded on, the Respondent appealed and is awaiting a full hearing on that matter. As to the parts that the Claimants lost on, they raised what we will call the substantive grounds and in addition take two points of apparent bias, the procedural points.

4. Directions sending this case to a preliminary hearing were given by HHJ Peter Clark, with a direction that deponents in the case, who are the first Claimant himself on the allegation of apparent bias and Mr Northall of counsel for the Respondent on the same point, should

attend to give evidence. The intention of the appellate Judge was if possible to deal with matters relating to procedure and to give a clearer idea of what issues might benefit from a full hearing. As we said at the opening of this case, having heard the parties, this case now proceeds as a full hearing with live evidence on the apparent bias point with the substantive points subject to a preliminary hearing being stayed until the outcome of the former.

The procedural background

5. The first Claimant is an experienced litigator, with a number of claims and appeals to his name, and these are relevant to the central allegation of apparent bias. In short, Judge Robinson knew the first Claimant, and it is contended he should not have conducted the hearing in Liverpool, the subject of today's appeal.

6. The procedural history appears to begin with a Judgment of Maurice Kay J (as he then was) in an EAT case known as **Healey v Exel Logistics** UKEAT/0846/97. The appeal of Mr Healey against the dismissal of his claim arising out of section 100 of the **Employment Rights Act** – that is, health and safety issues – was allowed, and there was substituted a finding that he was automatically unfairly dismissed and the matter sent for a remedy. The outcome of that remedy hearing was that he was reinstated, but Mr Healey was dissatisfied with the terms of the reinstatement issue, and he went on to appeal to HHJ Peter Clark and members, who, together on 5 May 2000, dismissed his appeal (see UKEAT/0084/99).

7. In the meantime, on 16 December 1999 Mr Healey brought an appeal raising one point (**Healey v John Adams & Sons Ltd** UKEAT/0025/99), which is that the Judge who had sat

upon his case was Mr Robinson, and Judge Robinson had been his solicitor. In the Judgment of HHJ Wilkie QC, as he then was, there appears this:

> **"2. Mr Healey appeals that decision on one ground only. During the hearing Mr Healy did not recognise the Chairman, Mr Robinson. Following the completion of the rehearing he contacted a firm of solicitors, Jackson & Canter on 28th October 1998 in connection with a remedies hearing in a previous successful claim that he had made against another employer. During a conversation with a Mr Cunliffe of that firm, Mr Healey realised for the first time that Mr Robinson, the Chairman of the Tribunal, was the same person who, in his capacity as a partner in that firm of solicitors, had advised him in connection with the *Exel* case. Mr Healey informed Mr Cunliffe of that fact. Mr Cunliffe pointed out to Mr Healey that, of course, Mr Robinson could not advise Mr Healey in respect of that other case but that would not prevent Mr Cunliffe from acting. However, that initial view expressed to Mr Healey by Mr Cunliffe was subsequently reversed. On the 2nd November Mr Cunliffe telephoned Mr Healey to say that he had spoken to Mr Robinson, and had been advised that the firm should not act for Mr Healy in connection with that other case.**
>
> **3. Therefore the position is that by the 2nd November 1998 Mr Robinson had been made aware of the fact that in his capacity as a partner in that firm of solicitors he had had dealings with Mr Healy in respect of a previous employment matter. It is on this factual basis, which is uncontested, that Mr Healey says that Mr Robinson's previous involvement with him compromised either his impartiality or the appearance of his impartiality in dealing with the current case as Chairman. Mr Healey confirmed the facts to which we have referred in an Affidavit. That Affidavit was presented to Mr Robinson for his comment. Mr Robinson, by a letter dated 23rd February 1999, accepted that Mr Healey did consult his firm in respect of that earlier case. He confirms that Mr Healey had seen a Mr Saunders at that firm. He states that he cannot himself recall seeing Mr Healey but that he may have done. He did not recognise Mr Healey during the Tribunal hearing but he says as follows;**
>
> > **'if I had remembered at the Tribunal that I had seen him or if I had known that my firm had acted for him, I would not have allowed myself to be Chairman of the Tribunal.'**
>
> **4. It seems to us that that was a perfectly correct position for Mr Robinson to take. On any view, that level of contact in respect of an analogous legal matter between one of the parties to the litigation and the person chairing the Tribunal, did give the appearance of want of impartiality regardless of whether, in fact there was any such want of impartiality. Mr Robinson and Mr Healey came to realise this prior connection at a stage when the decision was still under consideration and had not yet been promulgated. That means that the apparent want of impartiality arose at a time when the Tribunal had not concluded its active part in the litigation. Accordingly at a time when the litigation was still proceeding and therefore at a time when it was necessary in the interests of Justice for the appearance of impartiality still to be maintained. It therefore seems to us, however unfortunate it may be, that the attitude which Mr Robinson indicated he would have had at an earlier stage is the attitude which ought to have continued right through until promulgation. Therefore, even at that late stage, Mr Robinson should have indicated the position publicly and should have withdrawn as the Chairman of the Tribunal. It follows that this appeal must succeed and the matter must be remitted to an entirely different constituted Tribunal for Mr Healey 's application for unfair dismissal to be heard afresh by a Tribunal where there is no appearance of want of impartiality."**

8. The relationship between Judge Robinson and Mr Healey was fully described in that case, including the perception of Mr Healey in respect of the Judge's attitude to him.

9. A number of other cases have arisen, including Mr Healey's own, the subject of these proceedings. On 19 May 2011 the case opened, and immediately Mr Healey noticed from the screen outside the Tribunal the name of Employment Judge Robinson, and he inquired as to whether it was the Keith Robinson that he had previously come across and the clerk told him that was so. Mr Healey did nothing about his previous involvement with Judge Robinson and went on through the case.

10. He gave evidence to us, upon which he was properly cross-examined, on which we find that he did not think he could do anything about the fact that the Judge was sitting here. He remembered the **Adams** case that came before HHJ Wilkie's tribunal; he did not know that he could apply to the Employment Judge to recuse himself. He had not read the **Adams** Judgment recently. He remembered the gist, which was that the EAT found the Judge should have recused himself because of the previous involvement of the Judge with Mr Healey. He did not know that in the circumstances the Judge would have to recuse himself. He felt that it would put those whom he represented in a worse position. His view was that the EAT had said that Judge Robinson should have recused himself in the earlier proceedings. The Judge gave no indication that he recognised the Claimants. When he was asked whether he should have raised it, he recalls that he has now read Ms Eeley's skeleton argument, and another matter happened.

11. It was that in due course, when Mr Healey became employed by Wincanton, after the present proceedings, he was dismissed, and he brought proceedings himself for unfair dismissal, where the matter came before Judge Ryan. By that time, Mr Stone and Mr Gregory, two of the original Claimants in this case represented by Mr Healey, had been dismissed unfairly by the Respondent. The Respondent appealed to the EAT. The Judgment of Langstaff P and members on 11 October 2012 (UKEAT/0011/12) was to dismiss the

Respondent's appeal, and there again Mr Healey represented Mr Stone, but Mr Gregory was not represented. Again, Mr Northall of counsel appeared for the Respondent. Mr Healey's own case of unfair dismissal was aborted because of the successful application by counsel instructed by the Respondent for the Tribunal to recuse itself because the same Judge in the first-instance case of Stone and Gregory had expressed strong views against Wincanton.

12. That application was successful. And so between the end of the oral hearing in the present case, which was 7 September 2011, and its Reasons on 23 November 2011 Mr Healey saw learned counsel make an application for recusal of an Employment Judge because of language used by the Judge against a party, and it succeeded. He pointed out in his evidence to us that counsel in that case put in a lot of case law and a lot of research, and a very strong case was made about the very strong language of the Judge. In his submission to us, Mr Healey drew a distinction between that and the finding in his own case, where it was the mere connection between the Judge and Mr Healey that had caused the EAT to set aside his earlier Judgment. In the Gregory and Stone case it was the firm language of the Judge in the course of the proceedings which had caused the Judge himself to stand down upon application being made. He told us he had to have strong grounds otherwise it would simply antagonise the Tribunal against himself and the people whom he represented. It was put to him that he had nothing to lose, but he had confidence that he had put enough material in and the Judgment would come out properly in favour of himself and his colleagues. He felt that there was not enough for him to make an application to ask the Judge to step down.

13. The second part of his evidence relates to what occurred during the hearing, and these are the more detailed matters that Mr Healey set out in his affidavit about the conduct of the Employment Judge's solicitors firm. It is contended that the Judge acted with prejudice in a

number of individual respects. These include the existence of different documents called the "Labour Agreement", although in cross-examination he accepted that only the 1999 agreement was in evidence and this was the basis of the case as it was run before the Tribunal.

14. He also contended the Judge behaved unfairly in respect of his wish to cross-examine the Respondent's witness, Mr Bird, and on whether men had been sent to Argos to work or just for training (they are drivers). Mr Healey contended that this was relevant to the claim he was making for a determination of his terms and conditions. The Judge, according to Mr Healey in his evidence, told him that he could not ask Mr Bird anything about the matter, but he protested, and the Judge allowed only one question. On that basis, Mr Healey contends before us that the Judge accepted that the matter was relevant and the Employment Judge unfairly conducted the hearing so as to exclude any more than one question to Mr Bird upon that. Mr Northall did not dispute Mr Healey's account of that. Mr Healey had firm views about whether his claim arose under section 1 or section 4 of the **Employment Rights Act 1996**, but in submissions to us he accepted that some of this case was about the legal error of the Employment Tribunal, if it were to arise in the case.

15. Finally of substance is the issue of sick pay. Mr Healey gave evidence and contended that sick pay was a live issue before the Employment Tribunal. In paragraph 8 of its Reasons the Tribunal recorded this:

> **"Firstly, we were clearly told that the matter had been settled at the first hearing and secondly as Mr Healey has been paid […] we heard no evidence from either party and we cannot now adjudicate […]."**

16. It is said by Mr Healey that that represents unfairness to him. He has pointed out that the Judge himself made a ruling midway through the proceedings while there was a break in the

hearings, on 21 June 2011, in response to Mr Healey's application to have this matter dealt with in open tribunal. Mr Healey's application was that his own sick-pay matter (not Mr Gregory's, which was decided in Mr Gregory's favour) showed that there was a disagreement about whether the claim was settled or not and, "There is some debate ongoing", as he put it, and that therefore he wanted to bring some evidence about it, to which a reply was given on behalf of the Judge saying this:

> **"Employment Judge Robinson has said for you to leave out all evidence in relation to company sick pay."**

17. That, contends Mr Healey, is unfair. Mr Northall agrees that the issue was raised, but says he was surprised because he thought the matter may have been settled. That did represent, we find, the position of the parties at the opening of the case on 19 May, but by the time of the mid-hearing application in June Mr Healey was plainly saying the matter had not been settled and he wished to call material about it.

The First Claimant's case

18. Mr Healey's case is that this Judgment should be set aside. He is well aware that the consequence of a successful challenge on bias or apparent bias is likely to be that the part of the case he won would also be dismissed as well; but he fights on. The contention he makes is that the Judge should not have sat upon the case and that the instances of individual unfairness during the hearing are illustrations of the attitude of the Judge. He is not in a position to challenge the response of the Employment Judge to his evidence, which is this:

> **"I have dealt with him both as a client and as a claimant before a Tribunal of which I was a member.**
>
> **However, until receiving the affidavit I had no inkling whatsoever that I had come across Mr Healey previously. […]**
>
> **I left private practice ten years ago and cannot remember many clients for whom I acted and certainly not Mr Healey until I received his affidavit."**

19. He did not accept any criticism of his handling of the claim and noted that a major part of the Claimants' case had been successful, a point indeed adopted by Ms Eeley in her submissions. Nevertheless, Mr Healey contends that in light of the ruling of the EAT under Judge Wilkie, Employment Judge Robinson should not have heard the case even if he discovered the matter later. He contends that he cannot be criticised for not raising the matter when the case opened or until after he learned how to make a recusal application while his own Tribunal was still in deliberation.

The Respondent's case

20. The Respondent's case is that Mr Healey has waived his right. In any event, it is tenuous, since timing of relationships is important in discussing whether there is apparent bias. The time of the relationship was relatively proximate in 1998, whereas it is 13 years since that relationship or since the last appearance of Mr Healey before Judge Robinson occurred, and in those circumstances the appearance of bias would disappear. Mr Healey has waived his right by not doing what he should have done. He was the sole one with the knowledge of the relative position of himself and the Judge, and he should have raised it then. As to the individual complaints, these are all matters of case management well within the bands vouchsafed to a Judge to get the case running. Many of the issues may be black-letter appeals about declarations, determinations and so on, but they do not exhibit an appearance of bias.

The legal principles

21. The legal principles to be applied emerge from the Judgment of the House of Lords in **Porter v Magill** [2002] 1 All ER 465, where Lord Hope at paragraph 103 said:

> **"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."**

22. Burton P is upheld by the Court of Appeal in **Ansar v Lloyd's TSB Bank PLC** [2006] EWCA Civ 1462 as giving a long list of factors relevant to the exercise of the court in deciding what a fair-minded and informed observer would do. Most of the illustrations given in paragraphs 1-11 presuppose some knowledge by the Judge, all matters being drawn to the Judge's attention. In particular, he said this:

> **"Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise […] if:**
>
> **a. there were personal friendship or animosity between the Judge and any member of the public involved in the case; or**
>
> **b. the judge were closely acquainted with any member of the public involved in the case, [particularly if their credibility was involved]; or**
>
> **c. […] where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in […] outspoken terms […]."**

Discussion and conclusions

23. We prefer the argument of Mr Healey, on behalf of himself and Mr Stone, on what might be described as the constitutional issue. The first thing to note is that the law in relation to this particular set of individuals has been determined by the EAT in Judge Wilkie's case. It was easy for it to determine, for Judge Robinson had acknowledged at that time that had he known that Mr Healey had been a client of his firm he would not have tried his case. The EAT said that was correct. The EAT also went on to hold that the Judge had wrongly carried on to make decisions in the case once he knew of that relationship, and that too offended against the principle of fairness. The outcome of that appeal was that Employment Judge Robinson should not hear a case brought by Mr Healey. He went on, however, to hear this case. The Judge did not know by the time it reached him that this was Mr Healey whom he had previously tried. Thirteen years later may be a long period. It may be sufficient to extinguish the appearance of

bias as between a solicitor and a client, so that the solicitor, now Judge, may hear a party. Clearly, two years was not a sufficient gap.

24. The circumstances, however, are important, and they are different. This was not a case simply of the solicitor hearing his client. This was a case where the Judge had now decided against his former client on his claim, the former client had taken the matter to the EAT not on a technical legal issue of construction but on a direct criticism of bias as it was put (probably apparent bias, really) by Mr Healey against Judge Robinson, and therefore this is a stand-out issue. Thirteen years in the ordinary solicitor/client relationship may cause unfairness to disappear, but in the circumstances of this case we hold that that passage of time was not sufficient. Indeed, we hold that Judge Robinson should not at any time hear a case in which Mr Healey was a party in the light of their history.

25. The Judge was not aware during the course of this case of that connection. So the spotlight moves to Mr Healey himself. He is a self-representing party. He helps his fellow workmates, having been previously a shop steward in Unite, and he has now considerable experience of litigation before the ET and the EAT. We may have missed out the involvement of Mr Healey in his successful appeal on behalf of Mr Amin, another co-worker, before HHJ Serota QC and members (**Amin v Wincanton Group Ltd** UKEAT/0508/10), so he does not resist the depiction by Ms Eeley of an experienced lay person, but lay person he is. We know that it was unfair for Employment Judge Robinson to try Mr Healey in 1998, and the EAT ruled in 1999 he should not hear the retrial. We consider that the fair-minded observer would have knowledge of the 1999 appeal, and given the comments made in that appeal by HHJ Wilkie such observer would take the view that it would be unfair for Judge Robinson to try Mr Healey in 2011. Judge Robinson's acknowledgment to the Wilkie Appeal Tribunal in 1999 that had he

known, he would not have tried him is, we think, good for all time and not just for 13 years. That satisfies the first stage in the reasoning.

26. The question is: did Mr Healey waive his right to make the objection? We have no doubt that if the objection had been raised, Judge Robinson would have acceded to it: see above. Why would the Judge want to get involved again with Mr Healey in a six-day case when Mr Healey knows the route to the EAT? We consider that Judge Robinson's approach, correct in 1999, would have been retained in 2011 and he would have recused himself. His being involved gives the appearance of unfairness, and so one has to examine the circumstances surrounding Mr Healey's not raising it. It is clear that a party must be informed of all the facts relevant to his decision and of the consequence of the options available to him (see **Adamson v Swansea University** UKEAT/0469/09). If he does make a decision in those circumstances to go on with the case, he will be bound by that decision, even though there exists a real possibility of bias on the part of the Judge.

27. In our judgment, he had not reached that stage. We accept his evidence that he did not know that he himself could make the application for a recusal before the Judge. He pointed out that it was the EAT who found the unfairness in his case and who directed that the Judge should not hear the case. We accept his evidence that he did not know he could apply and that it would have made it very antagonistic for him and the people he was representing if he had raised it. He thought it was for the Judge if the Judge himself felt he should not try the case.

28. Within that is the criticism that in the light of what had been said in 1999 the Judge should himself have taken the point. Mr Northall, for the Respondent, knew nothing of the

history, and so the Respondent had no role to play on the day. On that basis, the situation on the day indicated that Mr Healey did not waive his right.

29. Did he waive his right when he saw in his own case of unfair dismissal counsel for the Respondent put forward an application and succeed? This was at a time when judgment was reserved in the present case, and Ms Eeley contends that he then had the wherewithal to go back to the Tribunal and ask for a recusal. We agree – in fact, he did – but we do not consider that he can be faulted in not doing so. He felt the proceedings were over; they were in the hands of the Judge and the members. The experience of the lay members in this court is that that is a very common experience: once the oral hearing is over, ordinary people do not think they can go and knock on the door of the Tribunal with a further submission or, in this case, an application that the whole thing be scrapped on the grounds of apparent bias. We reject the contention that once he had seen how it was done by counsel he sat on his hands and did nothing. In our judgment the test in **Porter** is met in respect of the constitutional position of Judge Robinson in this case.

30. We then turn to the individuated complaints. Most of these are complaints about the way in which case management was conducted by the Judge. As to this, the recent Judgment of Underhill J in **The Partners of Haxby Practice v Collen** UKEAT/0120/12 is very relevant, for it puts in perspective the acts of a Judge trying carefully to control a case and husband the time, and the view of an unrepresented party to this. It is in our experience quite common for someone in the back of a court to see a Judge intervening with a self-representing party, because that party needs help or focus, and not doing the same with counsel, simply because counsel is not making the same mistakes That looks as though the Judge is intervening unfairly to prevent the case being put, but properly understood from the perspective of the informed

observer the case is one of case management rather than bias. Underhill J gave careful observations about this phenomenon where he said:

> **"33. It is very common that self-represented parties have little idea how to question the other party's witnesses. There is nothing wrong in such a case in employment judges intervening in order to avoid cross-examination becoming a slanging match or becoming bogged down in irrelevances and to ensure that the essential points are put: indeed they should do so. The form of the intervention must be left to the discretion of the judge as a matter of trial management: different judges have different styles, and in any event the circumstances calling for intervention will vary very widely. There is nothing wrong in principle in the judge, in a situation of this kind, taking over the questioning on a particular point; nor in his or her taking the view that not every point of difference between the parties needs to be put – provided always that the witness has had the chance to give an answer on any point that is likely to be central to the case. There is of course the risk that a judge will lose objectivity by "descending into the arena" in this way, though generally a professional judge should be well able to resist the temptation. There is a much greater risk that, even though the judge is in fact remaining entirely impartial, it will not seem that way to the other party. But those risks sometimes have to be taken: while in a perfect world a judge should be able to sit back and let the parties or their advocates ask the questions, the employment tribunal is not a perfect world, and justice will sometimes, particularly where there are self-represented parties, require a more engaged approach. However, judges in such a case need to be alive to the risks, and they should do what they can to guard against them: in particular, they should do their best to defuse any perception on the part of the other party that the judge is 'taking sides'.**
>
> **34. Thus there was nothing wrong in principle in what the Judge set out to do. It seems that he was not able to do it without giving the impression that he was taking sides. That is a pity. It is particularly regrettable that his questioning of the Appellants' witnesses was perceived as "aggressive and/or dismissive". But it is impossible to know to what extent the Appellants' view reflects real defects in the Judge's manner as opposed to being the result of a distorted perception on their part. It does not help that the only evidence that I have is the unsatisfactory affidavit of Mr McEvoy. He does in fact cover this point, but he does so only in the most general terms, and the Judge's findings about him make his capability for objectivity somewhat suspect. There is also a question of degree involved. No judge is perfect, and even if on occasion the Judge's manner here was not what it should have been that would not justify a conclusion that he was not approaching the case impartially or that the Appellants had not had a fair hearing. Ultimately the question for me is whether the evidence establishes that an objective observer would have formed the view, from the conduct complained of, that the Judge was not impartial. I do not believe that it does. Still less does it establish that in either of the respects complained of the Judge's interventions actually disadvantaged the Appellants. As regards his indication that not every point need be put, Ms Alistari did not identify any particular point central to the Judge's reasoning on which Mr McEvoy or any of the Appellants' other witnesses did not have a chance to give their evidence."**

31. We gratefully adopt that.

32. The question of the sick pay is one that Mr Healey can rightly complain about. At a substantive appeal he would be able to say that the finding by the Tribunal is wrong because the Tribunal claim was not compromised. Even if it were right that the Tribunal was told at the first hearing that it was settled, the application by Mr Healey, in measured terms with details, it

had to be borne in mind the case was at that stage part-heard and it was refused by the Judge without Reasons, and that does give an indication of unfairness in treatment. The fact that the Tribunal found in favour of *Mr Gregory's* sick-pay scheme makes no difference, we think, because his circumstances were different.

33. The second matter relates to the cross-examination of Mr Bird. We accept from Mr Healey, and it is not contested by Mr Northall, that he was restricted to one question. That is unfair too, since by definition it is a relevant topic and it cannot be right that he can only have one question to ask. We have all seen the canny witness not answer the point; how easy that is when the witness knows there is no more to come.

34. We reject the other contentions of unfairness as being in categories either of errors of law amenable to challenge on an appeal or case management of a difficult case with a number of different Claimants and different representation and well within the scope of the discretion of the Judge on behalf of the Tribunal. For this also we bear in mind that the lay members were asked for, and have provided in rather more substance, answers to Mr Healey's affidavit, and they do indicate for the most part the view we have taken, which is that it was nothing more than mere case management.

35. There is a third individual matter, which is the contention by Mr Healey that documents had been fabricated by the Respondent. There is no finding by the Tribunal on this. This may be an oversight, but in the context of the very strong claim raised by Mr Healey and the feeling that he had about this, the failure to provide a decision on this does look unfair and an irregular procedure; on its own, not sufficient to set aside the Judgment, nor even, we think, with the other two.

36. However, those three individual issues would give the informed observer cause for concern, so we stand back now and look at the matter as a whole. Has there been unfairness to Mr Healey and to those whom he represented in this case? The qualification of those whom he represented is important, because we think if there is apparent bias in respect of Mr Healey, that affects him and his relations as a representative of others before this Tribunal. We consider that the primary ground, the constitutional ground, is enough to set this Judgment aside. The two smaller individual matters would not be matters for calling into question the whole of the Judgment. Put together, the three latter ones do give some further substance to the fair-minded observer's concern; in other words, this is not simply an abstract exercise but it has two concrete illustrations, and so in aggregate there has been unfairness in the form of apparent bias.

Disposal

37. It is common ground that, that being our finding of fact on the application of the law to the evidence, the Judgment would be set aside and an order made for a rehearing. That is what we do. That means that the Respondent's appeal can now be disposed of as well, there being no Judgment to appeal against.

38. We would like very much to thank Mr Healey for his measured contribution to us today, to Ms Eeley too, whose difficult task it has been to conduct this hearing independently, obviously now Mr Northall being a witness and no longer counsel, and to Mr Healey also for ably representing his former colleague Mr Stone.

39. We have reflected following submissions on the consequences of the other parties. All of them were served. Mr Greaves' solicitors wrote in raising a number of questions; he was content not to be a party to the proceedings, but he does have an interest in Wincanton's appeal. The persons represented by Mr Healey are in the same boat as him, because the unfairness to Mr Healey reflects upon them, but Mr Greaves was represented separately. Knowing that the outcome of a successful challenge on apparent bias, particularly by reference to the 1999 Judgment, would most likely be setting aside the whole of the Judgment, Mr Greaves is affected by this Judgment, and all of the cases will be set aside, with a rehearing of them all.