Appeal No. UKEAT/0159/12/SM
UKEAT/0347/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 April 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR H SINGH

MR S YEBOAH

BRITISH CAR AUCTIONS LTD — APPELLANT

MR A P ADAMS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTHONY SENDALL (of Counsel) Instructed by: Employment Law in Action Ltd 4 Regius Court Church Road Penn Buckinghamshire HP10 8RL
For the Respondent	Written Submissions

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

A lay Member of the Employment Tribunal hearing a claim of unfair dismissal by a former employee of the Appellant (A) had a son who worked for A, was related by marriage to a person who featured in the case (according to the ET1 and ET3), lived close to A's site, and knew a number of people who worked at the site. He did not declare this at the outset of the case, though the Employment Judge raised with the parties the fact that the other lay member had instructed counsel for the A in a case for her former employers. When A discovered this, and was told that the lay member had made disparaging remarks to his son about one of A's witnesses, it applied to the ET to recuse itself. The ET did not tell the parties (until delivering its judgment) what, of the alleged facts, the lay member accepted. A subsequent application for a review was rejected as being without prospect of success.

Both decisions were appealed. The EAT held that the well-informed fair-minded observer would think there was a real risk of bias, since it felt bound to conclude on probability that the lay member did not (as he claimed) raise his relationship with A and that his son, and a witness related to him, worked for A on the day of the hearing, in discussions with the EJ; and it followed that the observer would think he was consciously hiding the information, such that there was a real risk of bias.

The EJ indicated that he had known at the time the information which later came to light, he might well have made a different decision. The lay member had since unfortunately reacted to the allegations by accusing counsel for A as having no motive other than to cause him embarrassment, and alleged a conspiracy against himself even though he acknowledged this was without evidential foundation, thereby demonstrating an hostility toward A that made it impossible for him to continue to hear the case. These further matters confirmed the decision to allow the appeals.

Some additional guidance given to assist Tribunals where lay members have knowledge of matters which might be declared.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is a hearing of two appeals against respectively the refusal of a Tribunal at Leicester to recuse itself from further hearing of a case and a second appeal against the Tribunal Judge's refusal to review that decision. The decisions were reached respectively on 23 January 2012, reasons being given in writing the next day, and 15 March 2012, reasons being delivered again the day after.

2. The facts are regrettable. We shall come to those in a moment, but deal first with the position of the Respondent. The Respondent has indicated to us in writing that he does not seek to oppose these appeals. However, we have been provided with an application on behalf of the Respondent to strike out the appeal from further proceeding on the basis that at a preliminary hearing in my judgment on 12 October 2012, I referred to extending time for the service of an affidavit of Ms Isitt. The point is made by the representative on behalf of the Respondent (who is not, we think, a professional lawyer) that no such affidavit has been served. The fact is the record of the judgment contains a mistake. It should refer to Ms Carter and not Ms Isitt. The Appellant should have noticed the error and brought it to this Tribunal's attention, and did not do so, but that does not change its essential character. There is no reason in this for striking out the appeal. We have therefore continued to hear it.

3. In the course of the paperwork supplied by the Respondent and in particular in a skeleton argument, Anne Morgan, for the Respondent, has raised a number of factual points. We have considered each of those points, although she has not appeared to argue any of them before us.

4. It was recognised in **Porter v Magill** [2001] UKHL 67 at paragraph 102 in the speech of Lord Hope that where allegations of apparent bias are made, the approach should be that indicated in the speech of Lord Phillips of Worth Matravers in the case of **Re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700 at paragraph 85. There, Lord Phillips said:

> **"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 informed observer to conclude that there was a real possibility or a real danger (the two being the same) that the Tribunal was biased."**

5. Accordingly, in deference to that approach, we first consider the facts. Although some facts were in dispute, these are not. We gather them from all of the affidavit material and other material before us. First, the Tribunal was convened to hear a case of unfair dismissal brought by Anthony Adams against his employer, British Car Auctions Limited. The first day it was to sit was 20 September 2011. The Tribunal panel met for the case. It was presided over by Employment Judge Ahmed. The lay members were Mrs Higgins and Mr Alan Kirby.

6. At the very outset of the hearing, the Judge told the parties that Mrs Higgins recognised that counsel for British Auctions, Mr Sendall, was counsel she had played a part in instructing on behalf of a former employer of hers. The Judge was concerned to know whether this raised any objection in the minds of the parties. It did not and so the case proceeded. But at this same time, Alan Kirby knew:

(1) That the case concerned events at British Car Auctions at Measham;

(2) He lived close to Measham, he said three miles away, and there was every chance he might know some of the personnel who worked at Measham;

(3) His son had worked for British Car Auctions at Measham. That is the way Mr Kirby put it in a letter of 12 December 2011:

> **"He is not, I believe, employed by BCA, but is in fact a vehicles inspector."**

The Tribunal, however, later was to proceed upon the basis that his son did work for British Car Auctions, and his son's own evidence to us is that he worked for British Car Auctions Logistics Limited, which was an internal division of British Car Auctions. Accordingly, we have concluded that there was a link between Alan Kirby and a party to the litigation, British Car Auctions, in both family terms and geographical terms.

(4) Alan Kirby was sufficiently concerned that he might know someone who had some dealings with the case to phone his son at around 9.20am on the morning of 20 September to ask if his son knew the Claimant, Anthony Adams. He says that his concern was to ensure that he did not know any of the parties involved. He expressed that concern in two documents before us, one of 11 February 2012, the second of 20 November 2012.

(5) He did however know an Ian Mansfield. He was related by marriage. Ian Mansfield was the stepbrother of Alan Kirby's daughter-in-law. Ian Mansfield was named in the originating application and in the employer's response to the case. His name appears numerically four times in the ET1, but of greater significance, in the ET3. On two of those occasions, an important role is ascribed to him by British Car Auctions, since it is said that he heard words uttered by Mr Adams which were either contentious or an admission.

(6) Alan Kirby says that he mentioned the fact of his phone call and what it concerned to both Judge Ahmed and Mrs Higgins that morning before the case began. Judge Ahmed says that he does not recollect that having happened; Mrs Higgins does not confirm that it did. So Judge Ahmed, though he raised the position of Mrs Higgins, did not raise any question of the relationship between Alan Kirby and either Anthony Adams or Ian Mansfield or British Car Auctions.

(7) We infer (we think without possibility of dispute) that Alan Kirby would have been alert to the possibility that he might well know another involved in the evidence because of his close proximity to and family connections with British Car Auctions.

7. Those facts are, as we have said, undisputed and taken from the papers. We have to resolve one matter which is, however, the subject of dispute. That is whether the probability is that Alan Kirby raised the question of his relationship with British Car Auctions with the Judge and Mrs Higgins on the morning of the Tribunal. We cannot conclude that he did. Our reasons are that the Judge says that he had no recollection of him doing so. At paragraph 3 of his observations for the benefit of this Tribunal dated 12 December 2012, he said:

> **"I cannot now recall with certainty the discussions on the first morning of the hearing, given the passage of time, but I believe that had it been brought to my attention that there was a family connection involving Mr Kirby and BCA, I am likely to have raised that matter with the parties at the same time as the issue concerning Mrs Higgins. I should say that though I have sat with Mr Kirby on a number of occasions and I have always found him to be honest and truthful, but I cannot recall him raising this matter with me."**

8. Secondly, on 12 December 2011, Mr Kirby wrote to the Judge. In the second paragraph of that letter, written therefore within three months of the events which had taken place and written in response to an application by BCA that the panel recuse itself, he began a paragraph saying:

"You may recall that I informed you on the morning of this case ... that I did contact my son, Keith Kirby ..."

Adding at the end of the paragraph:

"I felt comfortable in accepting this case. You also did not see a problem."

9. It seems to us inherently unlikely that a Judge whose comments and contributions to this case echo with professionalism, in our collective view, would not have recalled that conversation of which he had been reminded within three months if it had happened.

10. Secondly, the Judge says he would have been likely to have raised the matter with the parties at the same time as that concerning Mrs Higgins. The practice of this Judge plainly would have been to raise such a matter. The evidence of that is that he actually did so on this occasion. Had he been told by Mr Kirby, he would, we consider almost certainly, have been prompted by what he said about Mrs Higgins to mention it too.

11. Finally, there is no support for Mr Kirby's recollection from Mrs Higgins. We make it plain that we have heard no evidence other than that provided for by the affidavits and commentaries and the documents. We have reached our decision on probability. It is an uncomfortable finding to have to make. We are conscious that it may be wrong, but it is one which we feel obliged by the evidence to reach. We conclude that there has to be some reason for the suggestion now made that he did raise the matter on that morning. His suggestion that he did is probably a reflection of a worry that perhaps he should have done. It is surprising to us that he did not, given in particular what Mrs Higgins had just said and the care plainly taken by the Judge.

12. The fair-minded observer, in whose eyes we have to view the matter, would think that there was a real risk that Mr Kirby was consciously hiding his connection with British Car Auctions. Having set out those findings of fact, we turn to what happened procedurally. The case was part-heard after 21 September. By then, Mr Mansfield's evidence had in part been considered. Mr Kirby had remained quiet about his actual family connection with Mr Mansfield, despite his expressed concern in the documents to ensure that he knew no one who might be a "party", as he put it, to the case.

13. In October, Ms Isitt, an HR manager for British Car Auctions, received an email from a branch manager. That branch manager told her this:

> **"A reliable source has informed me that a member of the AA Tribunal Panel is related to a BCA staff member. Apparently, the trade union man on the panel is the father of Keith Kirby, an inspector in the BCA inspections team. Keith is locally based and often works out of Meacham. From what I have been told, the trade union man has been quite indiscreet in his discussions about the case, and in particular has been critical about how Jason Jones handled himself in the witness box."**

14. Ms Isitt sought to speak as a result to the reliable source, who was identified to her as an Anthony Jackson. She did not feel able to tell the Tribunal that it was Anthony Jackson, because Anthony Jackson had asked for anonymity. He was therefore referred to at this stage as Mr X. Mr X (Anthony Jackson) told her, she deposed, that there had been a conversation between him, Keith Kirby, and his father, Alan, and his father had made a derogatory comment about the quality of Jason Jones' evidence. She set that out and sent the emails, suitably redacted, to the Tribunal.

15. British Car Auctions sought the recusal of the panel. It did so not because it necessarily feared that there was bias against it, but as Mr Sendall tells us (and we can understand) because

it was concerned lest at a later stage, should the applicant be unsuccessful, he might allege that there had been apparent bias in the Tribunal. That would be a costly matter to litigate and might have some potential chance of success. Accordingly, British Car Auctions were concerned to begin the case again with a Tribunal who were demonstrably untainted.

16. The Judge, we now know, had before the hearing in January received a letter of 12 December 2011 from Mr Kirby. He plainly was very upset about the allegations which he saw as having been made against him. The hearing of the application was not listed separately for the next day that the Tribunal was due to sit, 23 January 2012. Ms Isitt gave evidence. She was unchallenged, though she was asked by Anne Morgan if she had obtained confirmation of the conversation from Keith Kirby and she said she had not. At this stage, this was the only material before the Tribunal, apart from which anything which Alan Kirby himself had to say. The Tribunal listened to the application. It withdrew and considered its decision and without reporting any of the views or evidence which Mr Kirby could give it, accepted what Mr Kirby had to say. The first the parties knew of that was in the decision of 23 January.

17. The appeal against the conclusion of the Tribunal not to recuse itself asserts as the first ground that there was actual or apparent bias and therefore the Tribunal should have recused itself, and criticises the Tribunal for not having told the parties of Mr Kirby's position in the open Tribunal so that they might deal with any issue arising. Plainly, the material put before the Tribunal was unsatisfactory evidentially, since it consisted, at best, of third-hand hearsay evidence given by Ms Isitt, but Mr Sendall argues that if it had been known then what Mr Kirby's stance was, the applicant for recusal could have considered whether there was further evidence available to it which it would wish to give and made any appropriate application to introduce that; it would have been able to comment upon what was being said, for the

assistance of the whole Tribunal, and matters would have been dealt with in a transparent manner which would have reassured the partes that justice was being seen to be done and indeed done.

18. The Tribunal had asked whether there was any good reason for Mr X to remain anonymous. Mr Sendall said there was not.

19. An application was made for a review of the decision. That was rejected on the grounds that there were no reasonable prospects of the decision being varied or revoked. Prior to that decision being taken, Mr Alan Kirby sent a letter to Judge Ahmed dated 11 February. There he said again that he had conveyed to his colleagues on the Tribunal that there was no conflict of interest. He said in the second paragraph that a short statement by Mr Mansfield had been referred to during, he believed, day 2, commenting:

> **"Which if read, I hope you will agree has no real bearing at all on the eventual outcome of this case."**

And concluded in the last three sentences as follows:

> **"On Monday and Tuesday, 23 and 24 January 2012, I had to sit and listen to a diatribe of false accusation against me from the Respondent's Counsel. Not a single shred of evidence was presented to support this claim. I have no idea what he thought he was going to achieve, other than my total embarrassment."**

20. Later, after the appeal had been set down for hearing and the comments of the Judge and members had been invited, Mr Kirby wrote to this Tribunal on 20 November 2012. In his last paragraph he said this:

> **"I had to sit through hours of unfounded allegations thrown at me by Counsel for the Respondent without being given the chance to reply. I have never been so humiliated in my life. This case has tainted my long, unblemished career as a lay member of the Tribunal**

service. As allegations can be thrown at me without foundation, I can only believe that there is some sort of conspiracy going on against me. I know I have no proof of this, but cannot understand how we have come to this situation."

The law

21. We have been referred to the approval in the case of **Ansar v Lloyds TSB Bank plc & Ors** [2007] IRLR 211 of propositions which were set out by Burton J, as President of this Tribunal. We do not need to repeat all of those considerations, but we set out those which are material:

> **(1) The test to be applied, as stated by Lord Hope in *Porter v Magill* [2002] 2 AC 357 at paragraph 103, and recited by Pill LJ in *Lodwick v London Borough of Southwark* at paragraph 18 in determining bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.**
>
> **(2) If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. (*Locabail* at paragraph 21).**
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> **(3) Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of the Judge they will have their case tried by someone thought to be more likely to decide the case in their favour (*Re JRL ex-parte CJL* [1986] 161 CLR 342 at 352 per Mason J in the High Court of Australia) ...**
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> **(5) The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen. (Pill LJ in *Lodwick* at paragraph 18) ...**
>
> **(8) Courts and Tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment or stay cannot. (Sedley LJ in *Bennett* at paragraph 19) ...**
>
> **(10) In any case, where there is real ground for doubt, that doubt should be resolved in favour of recusal (*Locabail* at paragraph 25).**
>
> **(11) Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (*Locabail* at paragraph 25(b)): 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 the credibility of that individual could be significant in the decision of the case ... (e) for any other reason, there were real grounds for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections in bringing an objective judgment to bear on the issues."**

22. In the case of **Hamilton v GMB (Northern Region)** [2007] IRLR 391, the headnote correctly records the words of Elias J as President in setting out essential principles. The third of those was that:

> **"The Court must first ascertain all the relevant circumstances which have a bearing on the allegation of bias and then assess that information as would a fair-minded and informed observer. An Appellate Court is in as good a position as the original Court to assume the vantage point of the fair-minded and informed observer and so must itself make the assessment.**
>
> **(4) In determining the relevant circumstances, regard must be had for the Judge's actual knowledge ...**
>
> **(6) The possibility of bias can be waived, but only in circumstances where the party waiving is aware of all the material facts and of the consequences of the choice to him and has been given a fair opportunity to reach an unpressured decision.**
>
> **(7) When determining whether or not there is apparent bias, the Court will consider any statement from a Judge about his statement of knowledge, but it should test that statement objectively in light of all the evidence."**

The observation was also made that it is important that lay members who have any concerns at all about the propriety of their hearing the case must raise the issue as soon as possible with the Chairman, who in turn should explore fully the extent of any potential conflict of interest before hearing or continuing to hear the case.

23. Informed by that background of law and applying the test set out in **Porter v Magill**, we have come to these conclusions. First, it is plain that the hearing of this case before the same Tribunal cannot now proceed further because of the response which Alan Kirby has made to the application by British Car Auctions for recusal. The ill-judged allegations of conspiracy and that counsel for British Car Auctions has set out purely to cause him embarrassment may be an understandable reaction to what has taken place, but they make his position untenable, in our view, in the eyes of any fair-minded and well-informed observer as demonstrating an irrational hostility towards one party to what would inevitably be the continuing litigation. Those

comments, however, were made after the matters to which we must give central regard, which is whether there was an error of law in the decision reached by the Tribunal.

24. We consider that these matters are of significance: first, that Mr Kirby knew of his family relationship with the Respondent to the application; knew (as witness his own comments) that he ought to avoid a situation in which he knew people who might feature in the evidence; knew that that was a real risk; knew, if he had read the papers (and he does not say that he had not), that Ian Mansfield had been named in the papers in a significant way; and should have known at the least that he should have made a disclosure of those facts at the outset of the hearing.

25. An observer, fair-minded and well-informed, would think that there had been some conversation between Keith Kirby and Mr Jackson which concerned the Employment Tribunal and Alan Kirby's role in it. He would think, as we indicated in our findings of fact, that for his own reasons Mr Kirby had not revealed his connections. The failure to disclose that which there was a much stronger reason to disclose than there was in the case of Mrs Higgins, giving rise to that last concern on the part of the observer, would, in our view, give rise to the view that there was here a real risk of bias. This is not to say that there was bias. It is rather to emphasise the fact that one of the essential characteristics of bias is the fact that it tends to be hidden. Transparency is the enemy of bias and the guarantor of fair justice. We shall come back to those points.

26. We accept that the procedure adopted by the Tribunal was irregular and materially so. Although there was good reason for the Judge not taking with full seriousness what Ms Isitt had to say on the basis that it was third-hand hearsay and had not been further supported by anyone who could give a first-hand hearsay account of the conversation, nonetheless the Tribunal

should, in our view, have demonstrated the transparency to which we have just referred. An allegation of apparent bias always gives rise to difficult questions. The Tribunal or the Tribunal member concerned cannot be cross-examined. Mr Sendall expressly rejects any such possibility in his submissions to us, but that is not to say that the input of that member to discussion should remain hidden, as it were, until revelation in the final decision. It should be made clear to the parties so that they may deal with it, whether by way of further comment or application to call more evidence or the like.

27. Mr Sendall raised the question whether in the event of a challenge such as this, addressed to one member of the Tribunal, it was appropriate for the other members of that Tribunal to decide for themselves whether they accepted or rejected the account and whether it was appropriate that the lay member in the firing line should participate in that discussion. He wondered whether it might be better that the matter should be referred to a Regional Employment Judge or to some other Tribunal.

28. We have come to this conclusion: first, a Tribunal invited to recuse itself cannot duck the issue by passing a decision on to some other body. That other body is unlikely to have the familarity with the case which the application demands. The Tribunal must put itself into the position not of answering for itself, but of asking what the view of the well-informed, fair-minded observer would be. It is that perspective which it has to consider. In general, we trust the professionalism of Tribunals and their members to do just that. If there is any application which focuses upon the behaviour of one of the Tribunal, that does not excuse that member from participating in the discussion, again, we would expect, setting out frankly what he knows to be the case and honestly and professionally approaching any decision on the basis of the fair-minded, well-informed observer. Just as when a challenge is made to a Tribunal as a whole,

that Tribunal must as a whole determine it, so must a Tribunal as a whole determine a challenge made to one individual on it. There is no injustice in this, since providing that the reasons for any decision are clearly stated, if there is a failure properly to appreciate the viewpoint which is necessary, an Appeal Court can put it right.

29. A review is in the first instance under the Tribunal rules to be considered by the Employment Judge. Here, Judge Ahmed, as a further example of his professionalism, sought, we infer, the views of the lay members before reaching the conclusion that he did. The argument that Mr Sendall floated was whether in a case involving an allegation of bias there should be a reference to the Regional Employment Judge or some other body. We would reject that. An application for review should, as a matter of principle, be made to the body which made the decision which is under challenge. A sideways application to the Regional Employment Judge is neither a review by a body fully apprised of the facts, nor could it be an appeal. It is neither fish nor fowl.

30. We see no option but that the Tribunal, though accused of bias and having decided that it should not recuse itself, must deal openly and fairly with any application for a review of that decision. It should do so with the same professionalism it should bring to bear throughout. Here, for the reasons we have expressed, we have concluded that as a result of the chain of events which occurred, there could be no confidence that there might not be some bias in this Tribunal continuing after January 2012. It follows that we accept the first ground of appeal. It follows that the review application should have been allowed, as there were reasonable prospects of success. We have not needed to take into account in this the unfortunate comments made by Mr Kirby in November 2012, though they add further confirmation to our views, if it were needed, as to the result.

31. It remains only for us to give some guidance. First, regard must be had to the principles in the cases to which we have referred. Second, where an allegation is made against one member or two of a Tribunal of three, the Tribunal as a whole must as a whole deal with those allegations in accordance with that case law. Third, it is important that a member of an Employment Tribunal should, if he has any doubt (not, we would emphasise, about what she or he thinks, but about what the objective, fair-minded observer might think of the facts) should double-check that concern with the Employment Judge, and if available, the other lay member, before sitting. Some concerns may not merit a mention. We do not suggest that a Tribunal should raise every concern which might conceivably be raised. Indeed, if this were to happen, then the expectation might arise that it would always happen, such that if there was some reason to think in a particular case it had not, there would be allegations that that particular Tribunal was hiding something. If, however, reasonably there might be some concern, we would expect the Tribunal to raise that matter so that the parties might address any concern they had. This is not to invite recusal, but so that the parties can have confidence in the administration of justice, since the facts have been transparently laid out and have not had to be, as in this case, uncovered over time with a consequence that may very well be very different from that which would have applied had they been known at the outset.

32. We note in passing that the Employment Judge himself here said at the end of his comments to us in December 2012 that if the information now contained in the affidavits of Mr Jackson and Mr Keith Kirby been available at the time of the recusal application, he (the Judge) might well have taken a different view as to the issue of apparent bias. We think that comment is well-placed. It demonstrates the important of openness in the Tribunal procedures.

33. Apart from those comments and the guidance implicit in our dealing with the procedural issues, we do not think it necessary to say any more than that every case will turn upon its facts and provided that the Tribunal has careful regard to the potential reaction of the objective fair-minded observer and acts professionally, it will in general not err.

34. The consequence of this decision is that the appeal must be allowed, the case must be re-listed before a different Tribunal. We have expressly acquitted the Judge and Mrs Higgins of any appearance of bias. It is, however, appropriate, in our view, that it is a completely fresh Tribunal which sits to hear the case.

35. Can I add for the transcript then that where I said what Mr Sendall's motivation was, I had to intended to refer to 20 September 2011 and not to the intention as it developed subsequently.