Case Number: 2302649.2015

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms C Mortimer	and	Mr M Holmes

JUDGMENT ON AN APPLICATION FOR RECUSAL

Held at Ashford on 28 September 2017

Representation	**Claimant:**	Mr P Tapsell, Counsel
	Respondent:	Mr R O'Dair, Counsel

Employment Judge Kurrein

JUDGMENT

The Respondent's application is not well founded and is dismissed.

REASONS

1 These reasons should be read in conjunction with all earlier Orders and relevant correspondence.

The Application

2 By a notice dated 19 April the parties were informed that I had, of my own motion, decided that I should reconsider my Judgment sent to the parties on 24 November 2015.

3 The application that I should recuse myself from that reconsideration was made by the Respondent on 19 May 2017. No actual bias was suggested and the Respondent was "sure" that I had acted "without prejudice or partiality" in coming to my decision regarding two earlier applications for reconsideration which I had refused.

4 The Claimant's concern was that against a background where I had previously twice rejected such an application, and had been the subject of what "could be taken as implied criticism" by the EAT there might be a suspicion that I might reach a concluded view on the reconsideration before the hearing.

The Hearing

5 The application came before me today. I received.

5.1 A short bundle of documents from each party.

5.2 Skeleton arguments on behalf of each of the parties.

5.3 A copy of the decision in Locabail v. Bayfield Properties Ltd (1999) 1QB 451.

Matters of Complaint

6 The Respondent's Skeleton Argument expanded on the matters relied on in the original application, and sought to stress that the context in which the application was made was vital to a proper understanding.

7 The Claimant's Skeleton Argument only dealt very briefly with this application.

Reconsideration, the law

8 This is set out in the following provisions of the Employment Tribunal Rules of Procedure 2013 as follows:-

> **70 Principles**
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> A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **71 Application**
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> Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
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> **72 Process**
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> (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.
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> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which

made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

73 Reconsideration by the Tribunal on its own initiative

Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

9 In the context of an application for recusal I consider it of significance that Parliament has specifically provided that, where practicable, the decisions relating to and on reconsideration "shall be" taken by the original Judge.

10 In my view, having regard to the issues raised by the Respondent's Skeleton, the matters now raised in support of the application are of the following two types:-

10.1 Alleged errors of administration made by non-judicial staff;

10.2 Alleged errors by me of law or judgment in my earlier decisions to refuse the applications for reconsideration.

11 In the context of the latter issues I consider it highly relevant that I have, in effect, acceded to the application for reconsideration so that such will take place at a future hearing.

12 I took the view that in considering my position I should have regard to the principles set out by Burton J. in the EAT in Ansar v. Lloyds TSB Bank plc (2006) ICR 1565, as approved by the Court of Appeal,

"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.

3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [1986] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at paragraph 22.

4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Pty Ltd v

Australia & New Zealand Banking Group Ltd [1999] VSCA 35 recited in Locabail at paragraph 24.

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

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

7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at paragraph 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell [2004] All ER (D) 225 (Jul) at paragraph 41.

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.

9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, of the dialogue which frequently takes place between the judge or tribunal and a party or representative. No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in Peter Simper & Co Ltd v Cooke [1986] IRLR 19 EAT at paragraph 17.

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

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

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; or,

c. in a case 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 such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,

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

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

Further findings

13 On the basis of my above analysis of the events complained of and in light of my understanding of the applicable law I make the following further findings

14 I cannot accept that a fair-minded and informed observer, having considered the facts, would conclude that there was any real risk of bias on my part arising in respect of any alleged errors by administrative staff.

15 I also reject the suggestion that the alleged errors of law or judgment made by me in the course of my earlier decisions are of such a nature that a fair-minded and informed observer, having considered the facts, would conclude that there was any real risk of bias on my part. There is no suggestion that I was intemperate or unreasonable. In this context I bear in mind that a party seeking reconsideration is quite likely to be doing so because of alleged errors in the decision the subject of the request, and Parliament had decided that such requests should where practicable be dealt with by the original Judge.

16 I also note that Judges, by their nature, are at least in part selected for their ability to put aside any irrelevant information they may possess when considering their decisions.

17 In light of all my above findings I have determined that a fair-minded and informed observer, having considered the facts, would conclude that there was no real possibility that I was biased. This is not a case where there is a real ground for doubt.

Employment Judge Kurrein
28 September 2017