EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr E Ukwu	v	**1. Equiniti David Venus Limited** **2. Ultra Electronics Holdings plc** **3. Sharon Harris** **4. Mr Rackesh Sharma** **5. Mark Anderson** **6. Mary Waldner** **7. Ms Maria Balicao and others**

JUDGMENT ON THE CLAIMANT'S RECUSAL APPLICATION

1. The claimant's application for Employment Judge George to recuse herself from determining the Equiniti respondents' application for an order that he pay their costs is refused.

2. **Within 7 days of the day on which this order is sent to the parties** the claimant shall serve on the respondents and the Tribunal,

   2.1. His response to the costs application. He should set out his response to the application that, in principle, he should pay the Equinity respondents' costs and separately his response to the amount which they are claiming.

   2.2. He should include a schedule of his income and outgoings, assets (including businesses and properties) and liabilities. It may be relevant for the employment judge to consider to what extent the claimant's income or assets are or are not liquid or disposable, jointly owned, or subject to existing commitments, mortgages or encumbrances, claims, court orders or periodic payments and any

information that the claimant intends to rely upon relevant to this should be provided.

2.3. This response is to contain a statement of truth.

REASONS

1. The claimant applied by emails sent on 23 and 26 March 2018 for me to recuse myself from deciding the Equiniti respondents' application for an order that he pay their costs of the proceedings. A costs application was made by the Equiniti and Ultra respondents at the preliminary hearing of 3 October 2017 but was adjourned and the Equiniti respondents applied to restore that application by a letter dated 19 January 2018. The costs which are sought by that application are:

   1.1. Costs prior to 3 October 2017 of £3,604.80 which are said to have been incurred by reason of allegedly unreasonable conduct by the claimant in not complying with the tribunal orders and in the manner of his response to their correspondence;

   1.2. Costs of and occasioned by the preliminary hearing of 3 October 2017 of £2,513.25;

   1.3. £750.75 in relation to preparatory work following the 3 October 2017 preliminary hearing;

   1.4. £834.35 said to have been incurred in relation to preparing for the 10 November 2017 hearing which was adjourned on the application of the claimant;

   1.5. £969.15 said to have been incurred following the 10 November 2017 including in preparing the statement of costs.

2. The Ultra respondents have not applied to restore their costs application. I gave directions which were sent to the parties on 23 February 2018 for the management of the costs application which included orders for the claimant to respond to the application for costs and provide a schedule of income and outgoings. He has not complied with that order but has made an application for me to recuse myself from deciding the costs application on grounds of bias. Much of the email of 23 March 2018 makes plain that the claimant profoundly disagrees with a number of the decisions I have made in these proceedings. However he does not, in my judgment, allege actual bias. He alleges that I should recuse myself because of apparent bias.

3. In his email of 26 March 2018, he correctly identifies the seminal authority for apparent bias as being Porter v Magill [2002] 2 AC 357. He points out that the judiciary must ensure that it remains independent and that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially (see email of 26 March 2018). He points to a phrase by which Ms Warren of Clarion Solicitors concluded her mail of 26 March 2018 ("If the Tribunal has any queries in respect of the above, please do not hesitate to contact us"). Contrary to the impression apparently received by the claimant, I read that as being mere courtesy in the context of an email in which the Equiniti respondents' representatives ask whether the Tribunal would like their representations on the claimant's application for me to recuse myself. The Tribunal has not and would not correspond with one party to the claim without copying the communication to the other parties.

4. A similar situation to the present arose in Ansar v Lloyds TSB Bank plc [2007] I.R.L.R. 211 CA. There, the Court of Appeal approved the following statement of the law by Burton J in the EAT,

'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* [1991] 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."

5. In considering this application, in addition to the questions raised by the claimant, I have also had regard to subparagraphs (c) and (d) above: could be said that I had previously rejected the account of the claimant in any of my previous decisions or expressed views in such extreme or unbalanced terms as to throw doubt on my ability to try the issue of whether the claimant behaved unreasonably in his conduct of these proceedings and whether it is just and equitable to make a

costs order against him. In Oni v NHS Leicester City [2013] I.R.L.R. 91, the EAT warned that the Tribunal,

> "should not express itself in a way which tends to demonstrate that it has already made up its mind, prior to hearing argument, not only on the issues it had to decide but also on issues which only fall for decision if an application for costs is made. If a tribunal does this, the fair-minded and informed observer will conclude that there is a real possibility that the tribunal has pre-judged the question of costs." (paragraph 32)

I have considered whether, in my earlier decisions, I have expressed myself in a way which would cause the fair-minded and informed observer to conclude that there is a real possibility that I have pre-judged the question of costs. As the judgment in Oni makes clear, this does not preclude an employment judge or tribunal from expressing views as to the reasonableness or otherwise of a party's conduct in order to explain the reasons for making a case management order (see [2013] I.R.L.R. 91 at paragraph 34).

6. The claimant sets out the reasons why he considers that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that I was biased in his email of 23 March 2018. The allegations made can be categorised as follows:

   6.1. Refusal to accept medical evidence. In particular, the claimant alleges that the decision to hold the hearing of 3 October 2017 and make an unless order in the absence of the claimant when the claimant had provided what he regards as valid medical evidence excusing his attendance was biased and contrary to the evidence. Further the claimant alleges that he had provided evidence that he suffers from the serious medical condition of depression and my decision not to adjourn the hearing was in breach of the Tribunal's obligation to make reasonable adjustments. It is said that I failed to take account of the claimant's disability and that my comments about the medical evidence indicate that I am unable objectively and impartially to consider any submissions by the claimant for non-compliance with the unless order.

   6.2. Failure in the written reasons for the order of 3 October 2017 to set out the relevant facts and law, take sufficient account of the points made by the claimant and reliance upon inaccurate, illogical and fallacious representations by the respondents;

   6.3. Bias disclosed in the criticism of the claimant in the written reasons of 3 October 2017; it is suggested that I took offence at the claimant's objections to the order for sequential exchange of witness statements;

6.4. Specious reasoning for blaming the claimant for a failure to comply with the order of 23 June 2017 which was due to the delay in the Tribunal sending out the orders and written record of hearing;

6.5. Difference in treatment between the claimant and the respondents although no particulars of that difference in treatment have been given;

6.6. Predetermination of whether to make an unless order at 3 October 2017 hearing;

6.7. Use of selective chronology in the judgment on the claimant's application to reinstate the claim;

6.8. Unjustly criticising the claimant for failing to attend the hearing of 3 October 2017;

6.9. Misleading description of the claimant's communication and unfairly maligning the claimant as the reasons for holding the hearing in his absence mean that I have compromised my impartiality and objectivity;

6.10. The claimant alleges that the unless order, judgment dismissing his claim and the initiation of cost proceedings against him are part of a concerted effort to silence the claimant and victimise him for making protected disclosures and to cover up the manner in which his claim has been dealt with.

7. Taking each of those points in turn (although there is some overlap)

7.1. Criticism of my actions on 3 October 2017

7.1.1. Refusal to accept medical evidence. The medical evidence before me on 3 October 2017 is described in paragraph 5 of my reasons for refusing the strike out application sent to the parties on 5 October 2017. The history of the postponement application is in paragraphs 6 & 7 from which it can be seen that I reasonably concluded that the claimant, although certified unfit for work and unable to attend the employment tribunal, must have, on 2 October, felt himself fit enough to attend for the preliminary hearing because he wrote to the Tribunal saying that he intended to do so before making an application for a postponement on grounds of the statement that he was unfit for work. Besides this, given that the consequences of the non-compliance with case management directions was the loss of the hearing date, it was in accordance with the overriding objective of avoiding delay and cost of proceedings with case management orders in the claimant's absence in order to try to get the proceedings back on track (see paragraph 8 of my reasons). My view of the medical evidence was apparently shared by REJ Byrne who had

refused an application for a postponement ahead of the hearing. I disagree that I refused to accept medical evidence. Rather, I did not consider that the medical evidence was sufficient reason to postpone the preliminary hearing when the consequence would have been disproportionate further delay to the litigation. I took into account the medical evidence when setting the time period within which the unless order needed to be complied.

7.1.2. (In effect) rejecting the claimant's arguments and accepting the respondents'. On 3 October I refused the claimant's application for a postponement on grounds of ill health and refused his application to vary the order for sequential exchange of witness statements. On the other hand, I refused the respondents' application for an order striking out the claim. I also refused to make an immediate order that the claimant pay the respondents' costs of and occasioned by the postponement of the final hearing. I did make an unless order in respect of the order for sequential witness statements set a period of 4 weeks for compliance rather than the 7 days sought by the respondents. I granted some of the relief sought by the respondent and refused other applications. I do not agree that I showed actual or apparent bias in the arguments which I accepted on rejected on 3 October 2017.

7.1.3. Taking offence at the claimant's objections to the order for sequential witness statements. I note that, in paragraph 26 of the reasons, I do criticise the claimant for apparently focussing on fighting interlocutory steps in the proceedings and losing sight of the main objective which is a fair trial of the claims. However, this is in the context of my comment that both parties need to avoid raking over every prior step in the litigation. I did not take offence at the claimant's objections and do not consider that a reasonable and fair minded observer would regard me as having done so, particularly in the context of criticism of all parties to the litigation and the risk that the case would become stale if impetus towards a final hearing was not maintain. There is also even-handed criticism of both parties in paragraph 28: of the claimant's hostile correspondence and of the respondents repeated threats to strike out the claim. In my view, a reasonable and fair minded person with knowledge of the procedural history and correspondence in the case would not think that I was biased. I was critical of both parties in reaching my conclusion that the claims should not be struck out.

7.1.4. Blaming the claimant for a failure to comply which was caused by the Tribunal's delay. It was clear from the correspondence between the parties that the claimant wished to wait for the written order from the tribunal before taking further steps. The respondents' representatives

were arguing that they should be complied with nonetheless. The administrative burden of work in the Tribunal, which followed the decision in late July 2017 in R (Unison) v The Lord Chancellor [2017] I.R.L.R. 911 UKSC and the consequent removal of the requirement for litigants to pay a fee before presenting their claim, meant that there was a significant delay in promulgating the written record of orders made on 23 June 2017. This was, clearly, not the fault of any of the parties in this case and I have previously apologised for it. However specific dates had been set for compliance with certain case management orders: I did not order compliance within a period of time after receipt of the written record of hearing but by specified dates. The fact that the written reminder of these dates had not been sent out by the Tribunal was simply not an adequate reason for non-compliance. It is normal practice that litigants should be bound by the case management orders which have been articulated in open tribunal in their presence, even if the written record of the hearing has not yet been promulgated. I do not think that a reasonable and fair-minded person with knowledge of the circumstances, including that the claimant had recorded the hearing, would conclude that there was a real risk that I was biased against the claimant from the fact that I reached that conclusion.

7.1.5. Predetermination of whether an unless order should be made. I attached an unless order to paragraph 4 of the case management orders of 23 June 2017 and it was promulgated with] when the notice of hearing for the preliminary hearing for the 3 October 2017. The decision to make an unless order in relation to the claimant's failure to comply with paragraph 5 of the case management directions of 23 June 2017 was made on 3 October 2017 and not before.

7.1.6. Unjust criticism of the claimant for failing to attend the hearing of 3 October 2017. I do not consider that I criticised the claimant for failing to attend the hearing of 3 October and the claimant does not point to specific words in either of the orders sent out following that hearing to support this allegation. Indeed, the consideration of the respondents' costs application (paragraphs 40 to 45), shows that I declined to reach a conclusion about whether the claimant's conduct was unreasonable in the absence of his explanations when he had put forward medical evidence which he relied upon to excuse his absence.

7.2. Selective chronology in the reasons for refusing to reinstate his claim. The claimant does not allege that there are particular steps in the chronology that I omitted to refer to in my judgment refusing to reinstate his claim which I should have taken into account. In the absence of a particular allegation I have reviewed the chronology and I consider that it is not lacking in

objectivity. In particular, I did not seek to minimise the further administrative delays on the part of the Tribunal which meant that the parties did not receive the decision of EJ Smail refusing the claimant's application for "relief from sanction" until after the date on which the claim was struck out. I reject this criticism.

7.3. Misleading description of the claimant's communication and unfairly maligning the claimant. A fair reading of the claimant's email of 23 March 2018 suggests that when he is critical of my interpretation of the medical evidence that is in relation to my decision to hold the hearing of 3 October 2017 in his absence. However, in the absence of a more specific allegation about which parts of my judgments suggest that I have misrepresented his communications or unfairly maligned him I have reconsidered whether my conclusion that the medical evidence did not excuse the claimant's failure to produce his witness statement by 11 August (as originally ordered) or by 2 November (as directed by the unless order) shows evidence of apparent bias. I disagree that I disregarded the medical evidence. Paragraphs 14 to 26 of that judgment show that I engaged with the medical evidence and with the professed reasons for the failure to provide the witness statement. I do not think that the fair-minded and informed observer would conclude that there was a real possibility that my conclusion that the medical evidence did not excuse the failure to provide the witness statement showed bias on my part.

7.4. Concerted effort to silence the claimant through use of unless order, judgment dismissing his claim and initiation of costs proceedings. The import of this argument is that there is a conspiracy between the Tribunal and the respondents. There is absolutely no evidence to support this. Far from trying to silence the claimant the Tribunal's efforts have been directed towards encouraging the claimant to explain his claim with particularity so that it could be understood and that there could be a fair hearing of it on the merits.

7.5. Would the reasonable and fair-minded person think that there was a real risk that I had prejudged the costs issue? In the reasons which I gave for making the unless order, I described the claimant as reacting with "unnecessary hostility" to the respondent's attempts to get the hearing back on track and to indulging in inflammatory oratory in his correspondence. This was in the course of concluding that the claimant had avoided complying with the order for sequential exchange of witness statements. However, I expressly declined to make a judgment about whether the claimant's conduct was unreasonable. I drew the claimant's attention to the Tribunal's power to award costs where there has been a failure to comply with one of its orders. When I re-read the judgment refusing the claimant's application for the claim to be reinstated, there I go no further than to say that there was an element of wilfulness in the default (see paragraph 26). I do comment in paragraph 36

that the claimant is not entitled to unlimited patience if there are no reasonable grounds for his failure to comply with the Tribunal orders. That was in the context of needing to consider what the reason for his failure to comply with the unless order was.

8. This seems to me to be a situation similar to that in Ansar where I have in previous case management decisions made some comments which could be regarded as critical of the claimant. However those were in the context of decisions which I needed to make at the time on the issues then before me and I do not think that those comments disqualify me from further involvement in the case. I do not consider that I expressed myself in such extreme terms that a fair-minded observer would think there was a real possibility that I had pre-judged the question of costs. I refuse the claimant's application for me to recuse myself.

9. It would be of benefit to me, when deciding the costs application, to have the claimant's response to it, both as to the principle of whether he should pay costs and as to the amount. I have decided, therefore, to extend time for his response to the costs application to 7 days after the date on which this order is sent to the parties. There is no requirement for further submissions from any other party. If there is no response to this order by the claimant, then I shall proceed to decide the costs application without further communication to the parties.

_____

Employment Judge George

30 April 2018

Sent to the parties on:

.....

.....

For the Secretary to the Tribunals