Appeal No. UKEAT/0191/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 February 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MRS S KIDD — APPELLANT

THE COMMISSIONER OF POLICE OF THE METROPOLIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS IMOGEN EGAN (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS REBECCA TUCK (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Following a 14-day hearing the ET comprehensively rejected a large number of claims.

The Claimant appealed on the basis of "apparent bias" on the part of the Employment Judge. She relied on two incidents during the hearing; the first arose from questions asked of the Claimant by the Employment Judge at the conclusion of her evidence; the second from his treatment of her counsel following an incident between counsel where the Claimant's counsel had stated that conduct by her opponent could be seen as an attempt to corrupt the witness evidence.

On analysing the facts and looking at what happened in context, the EAT decided that a fair-minded and informed observer would not have concluded that there was a real possibility that the Employment Judge was biased against the Claimant.

The appeal therefore failed.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Samantha Kidd based on an allegation of apparent bias by Employment Judge Snelson sitting in the Employment Tribunal in London Central. I record, for the purposes of this Judgment, as I have already with the parties at the very outset, that I was at the same school as Employment Judge Snelson, although he was a few years above me, and that I know him slightly through the employment law context. He was sitting with members on this occasion: Messrs Buckley and Javed. Counsel for the Claimant was Miss Staunton, and counsel for the Respondent was Ms Tuck. Ms Tuck appears for the Respondent on appeal; Miss Staunton has been replaced by Imogen Egan, who has stepped into the breach.

2. Following a hearing in the London Central Employment Tribunal, which involved one day of reading, 14 days of evidence and submissions, and three days in chambers during April and May 2016, the Employment Tribunal rejected Mrs Kidd's complaints against the Respondent under the **Equality Act 2010** and dismissed the proceedings.

3. The Respondent is the Commissioner of the Metropolitan Police. The Claimant was a police constable from 2004. In 2012, she was diagnosed with depression, which was a continuing condition, and which was agreed by all parties to be a disability in the technical sense of the term, for the purposes of the **Equality Act 2010**. The Claimant brought some proceedings in September 2013 against the Commissioner, alleging disability discrimination arising out of a failure to make reasonable adjustments. That claim was settled on 13 May 2014; the settlement agreement is described at paragraph 35 of the Judgment in this case, and it related to the hours and place of work which could be required of the Claimant.

4. In July 2015, she brought a claim alleging sex and disability discrimination and victimisation (arising from the earlier 2013 proceedings). In January 2016, she brought further claims, alleging disability discrimination and harassment. Those two claims were the subject of the hearing before Employment Judge Snelson and the members.

5. In paragraphs 5 to 12 of his Judgment, the Employment Judge complained - I think that is a fair word - about the way the case had been run by and on behalf of the Claimant and about the conduct of her counsel, Miss Staunton. There had been four Preliminary Hearings and many draft lists of issues. He complained about the range of the complaints raised by the Claimant and their diffuse nature. He said that some of them were "*spectacularly trivial*", and he made a general point that "*This kind of over-litigation is a real problem in our jurisdiction*". I will come back to what he specifically said about Miss Staunton, which appears at paragraphs 10 to 12 of the Judgment.

6. Then, at paragraphs 13 to 27, the Employment Judge set out the relevant law, and at paragraphs 31 through to 155 he dealt, in detail, with the claims and gave full reasons for rejecting each of them. In the course of that part of the Judgment, he made various adverse comments about the Claimant. In particular, at paragraph 114, he recorded that the Tribunal found "*no substance whatever in any of the claims under heading (a)*". We need not trouble with what heading (a) was, but he went on, "*The Claimant has demonstrated no foundation for making any form of complaint, let alone bringing legal proceedings*". The reason for everything he was describing was because of the Claimant's own unexplained failure to put forward a compliant rota, and that relates back to the settlement agreement which I have mentioned. Then, in brackets, he said this:

> **"114. … (We [that is, the Tribunal] will not speculate as to what lay behind that failure but we cannot forebear to observe that (a) elsewhere in this sorry tale there are numerous instances of her being difficult, confrontational, and childishly obstructive (and there is no evidence**

offering a medical explanation for this behaviour) and (b) the idea that there was any difficulty in producing a compliant rota is belied by the immediate resolution of the problem once she was warned that she would soon be receiving pay commensurate with the hours she was actually working.) …"

7. Consequently, there were some adverse comments. There was a repetition of the allegation of childishness at paragraph 128, where the Tribunal Judge referred to the Claimant's refusal to engage in telephone contact, and that was in the context of a visit made to her house on 8 July 2015 about which she complained. Then, at paragraphs 130 and 150, there was a reference to the Claimant wanting to impose her will. The particular reference at paragraph 130 says this:

"130. … She [the Claimant] was angry and frustrated that her attempt to impose her will on events the day before and prevent the home visit had failed and did not relish spending time with the officers who carried it out. …"

At paragraph 150, dealing with another specific complaint, the Judge says:

"150. Here again the Claimant resorts inappropriately to law having failed to impose her will on those with responsibility for managing her. …"

8. Then, in a section at the end of the Judgment, starting at paragraph 156, headed "*Rationale for Primary and Secondary Findings*", the Judge makes further comment about the Claimant. Dealing with her evidence as a whole he said:

"156. … Unfortunately, we did not feel able to place much confidence in the Claimant's evidence. She struck us as an individual who has become consumed by a sense of injustice (which, we have to say, appears quite irrational) and seems unwilling or unable to regard any part of the history which we have been taken through in a dispassionate way. …"

He goes on:

"156. … It may be superfluous to add that there is no evidence which could entitle us to attribute her severely distorted perspective to her disability. …"

9. He then said that "*the Respondent impressed [the Tribunal] as careful and conscientious*" (paragraph 157), and then, referring to the fact that the Claimant's case rested on

A the assertion that substantial numbers of officers had combined and conspired over an extended period of time to cause her harm and distress, he basically said that the likelihood was against her, and in this context he also said:

> **"158. … We were struck by the remarkably egocentric outlook on which that theory [i.e. of conspiracy], and her case generally, was based. …"**

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10. There is then reference to other bases, not least the contemporary documents for the findings of fact. Then, at paragraphs 162 and 163, the Employment Judge records the outcome and a post-script in these terms:

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> **"162. For the reasons stated, we reject the entirety of the Claimant's case as quite unfounded. We further hold that a very substantial part of it was presented out of time and, on that account, falls outside our jurisdiction.**
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> **163. The Claimant told us in evidence that these claims, however decided, will not put an end to her quarrel with the Respondent. There is, apart from anything else, the outstanding appeal against the reduction to half pay. As we survey the wreckage of this disastrous litigation, we can only regard with despair the prospect of renewed forensic hostilities of any kind between these parties. They and their advisors should now confront the uncomfortable reality that cases of this sort have no winners and make reconciliation and a fresh start their only objectives."**

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11. It is clear that Employment Judge Snelson and his two colleagues must have formed a dim view of the Claimant and of her claims. That, of course - namely forming a view about her and her claims - is part of their job and cannot, in itself, form any basis for an allegation of

F apparent bias.

12. Turning to the specific grounds of appeal, let me first remind myself of the law. The

G question, in relation to an allegation of apparent bias can be summed up in a short sentence: it 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. I will just make a few observations about that which are common ground. The fair-minded and informed observer for

H these purposes is me; I have to be fair to everybody, and I am informed about the process as well as the actual facts in this case. Second, I have to look at the question in the light of all the

A circumstances that are relevant, and each case is extremely fact-specific. The third thing is that it is an objective test. And the fourth point is that there must be a "real possibility" before I can find that there was apparent bias.

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13. I have been referred to a number of familiar authorities, in particular **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] IRLR 96, and I will just pick out a couple of passages from the Court of Appeal's decision which are in the head note. First of all, this:

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> **"… The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness to be unreliable, would not by itself found a sustainable objection."**

However, later on it said:

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> **"… if on any question at issue in the proceedings before him the judge had expressed views, possibly during the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real ground[s] for doubting the ability for the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him [then apparent bias may be demonstrated]." (Those last words are my own extrapolation.)**

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14. There is also a relevant quotation from a case called **Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz** [2016] EWCA Civ 556, where it is said at paragraph 71:

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> **"71. … even if a judge is irritated by or shows hostility towards an *advocate*, it does not follow that there is a real possibility that it will affect his approach to the *parties* and jeopardise the fairness of the proceedings. From time to time, the patience of judges can be sorely tested by the behaviour of advocates. Sometimes, a judge will overreact and unwisely make an intemperate comment. But judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case they are hearing. The informed and fair-minded observer is to be assumed to know this."**

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15. Finally, a case called **Ansar v Lloyds TSB Bank plc** [2006] EWCA Civ 1462, where there is a quotation, in fact, from Burton J, which draws attention to one particular feature of this area where he said:

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> **"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 …"**

16. Before leaving the law, I was also reminded of and bear in mind the overriding objective in the **Tribunal Rules**, and specifically Rule 41 which makes the point that:

> **"The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. … The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. …"**

17. Coming to the meat of the appeal, the Claimant relies, really, on two exchanges that took place during the hearing: the first was on day 5 at the close of the Claimant's evidence; and the second was over days 9 to 10 in exchanges between Employment Judge Snelson and Miss Staunton. Both those exchanges feed, says Ms Egan, into the judgment and the ultimate decision.

18. Coming to detail, the exchange on day 5 is to be found at page 295 of my bundle (which is actually an amended grounds of appeal) which sets out the exchange almost verbatim; it is not a transcript, but it almost is. It took place at the conclusion of the Claimant's re-examination, after she had been in the witness box for probably two days or so. It is accepted as an accurate reflection of what was said by Judge Snelson. It starts with Judge Snelson saying to the Claimant, "*You make a lot of complaints about a lot of people. Is there anything you might have done better?*". To which she replies, "*I could have listened to my GP more*", to which the Judge says, "*I am thinking more about the officer*" (it may be "the officers"). Anyway, he goes on, "*People say it's all about them; their employer - employer says that she was her own worst enemy. We sometimes find that both sides are wrong. Is there anything you think you would have done differently?*". The Claimant does not really deal with that.

19. The Judge then turns to another topic, "*where are you now? Your [sic] still with the police with the hostility and your appeal?*". She says, "*There is an outstanding appeal on the*

half pay". The Judge says, "*Yes. And your [sic] contemplating another tribunal claim about that, aren't you?*", to which she said, "*I didn't want to be in front of the ET, I'm not thinking about bringing another one*". To which he says, "*Well, you're not thinking of another one? No! ha. Where did you think, it will lead you?*". She says, "*I hope I can go back to work*". The Judge says, "*We've read that you say you have lost faith*", to which the Claimant says, "*I used to be happy - I have lost everything - I just want to go back into work*". The Judge says, "*Do you think 19 days of this will make it any better?*" - that is a reference to the time estimate of 19 days - to which the Claimant says, "*No I think it will make it worse*". To which the Judge says, "*Hmmm! Thank you very much? [sic]*".

20. As I say, that is accepted as an accurate reflection of what was said. It is the Claimant's evidence (and there is no reason to doubt) that those words upset her. However, equally, her subjective feelings, really, are irrelevant. What is of importance is an objective assessment of what the Judge said and did. The Claimant said not only that she was upset but that those questions were asked in a forceful, condescending and sarcastic way. I think the only other evidence I have is that the Employment Judge denied that he asked the questions in that way, and Mr Buckley (one of the lay members) said that he saw them as "*sympathetic*". I suspect the truth is somewhere in the middle and that Mr Buckley is being overprotective of Judge Snelson and the Claimant is perhaps exaggerating the tone.

21. However, in any event, I make the following observations about that exchange. First, it is pretty short as a series of questions in the great scheme of the case and in the scheme of the Claimant's evidence which, as I say, probably lasted two days. The timing of those questions was clearly appropriate; it was after re-examination, which is the right time for a Judge to ask the questions. The third thing is that, although not directly and obviously relevant to any

specific issue, the questions do not seem to me to be unreasonable, particularly in the context of this case. Indeed, they were, arguably, relevant to the Tribunal's need to make an overall assessment of the Claimant and her motivation, which were things that could properly feed into their decisions about her credibility and who would have done what. The fourth thing is that they are open questions. They are not, on the face of it, hostile. For example, the Judge says, "*We sometimes find that both sides are wrong*".

22. I then turn to the exchange with Miss Staunton, which happened on days 9 and 10. Again there are almost verbatim accounts of what was said at pages 296 to 297 of my bundle. I am not sure offhand who it was that Miss Staunton was cross-examining amongst the Respondent's witnesses, but Ms Tuck has admitted today, quite freely, that she did indeed interrupt Miss Staunton's cross-examination at some point in the afternoon of day 9. Her own explanation for doing so is really that there were some emails which were relevant to the questions that she was asking and relevant to the questions that Miss Staunton was asking and she felt that they ought to be referred to at that stage. In fairness to the witness, Mr Buckley (who was a lay member) says this about why the interruption took place (at page 268):

> **"16. The necessarily adversarial nature of Tribunal proceedings has been particularly demonstrated in the relationship between the parties' counsel and where Miss Staunton's opposition to any interjection by Miss Tuck is demonstrated by the events which occurred in the late afternoon of Thursday 28 April 2016 [that would be day 9], when [Detective Sergeant] Susan Wilson, CMU, was being cross-examined. …"**

He, a bit later on, expresses the view that:

> **"16. … it was not unreasonable of Ms Tuck to seek to take the Tribunal to the beginning of the email chain which related to emails of Mrs Kidd's line manager, PS Kelly Troni. My recollection is that this was not the first occasion on which witnesses had been cross-examined by Miss Staunton without reference to the relevant documents contained in the bundle."**

23. Whatever the justification for the interruption, it led to Miss Staunton saying to the Judge and the Tribunal as a whole, "*Ms Tuck in directing the witness to a page they are not*

even party to could be seen to be attempting to corrupt the witness evidence". To which the Judge said, "*that is an extraordinary think [sic] for you to say Ms Staunton!*" (at page 296). It seems that Ms Tuck was upset by it, and it lead to a short adjournment.

24. Mr Javed (who is the second of the lay members) in his comments (at page 275) said that this was an:

> **"… unprofessional accusation made against Ms Tuck. Ms Tuck was so upset that we had to take a break. We thought that unless Miss Staunton apologised, Ms Tuck might report her for unprofessional conduct. …"**

He goes on, "*When the parties came back, nothing was said and they continued with [the] case*". That is indeed so.

25. The following morning, the Judge returned to the matter and asked Miss Staunton (at page 296), "*What are you doing about your allegation? Are you withdrawing it?*". At which point Miss Staunton tried a number of times to explain her position. The Judge said, "*You said she was attempting to corrupt*", to which she said, "*I'll withdraw the attempt - I meant there was a risk*". The Judge then wanted an apology. She said, "*Yes and no - I'll explain why*". She then started to explain things and the Judge shouted - I think it is clear - "*OH PLEASE, MS STAUNTON!*" The Judge then asked her, "*Have you learned your lesson [about the language you use]?*", to which she said, "*Yes, sir*". Then, "*in a raised voice*" the Judge said, "*and you need to learn it is down to the tribunal about how they deal with a case! It isn't for you to say! Do you understand?*". To which she said, "*Sir, but I feel the need to object …*", to which the Judge said, "*Don't you tell us how to do our job! You need to understand that [is] how it will be! Now carry on with the questions!?*". She did so, as far as I am aware.

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26. There is no doubt that the Employment Judge raised his voice during those exchanges and that he did not let Miss Staunton finish what she wanted to say. He also dealt with this in the Judgment (paragraph 10), where he says:

> **"10. … at one point she [Miss Staunton] made an extraordinary and entirely unwarranted allegation of professional misconduct on the part of Ms Tuck. That led to a short break. We hoped that she would exhibit the grace and maturity of judgment to withdraw the charge and apologise, but we were disappointed. The hearing resumed without comment from Miss Staunton. When we raised the matter the following morning (as we felt we must), she began with a stance which combined defensiveness with obfuscation and eventually moved only so far as to offer what seemed at very best a grudging and incomplete retraction. We heard nothing which we could properly call an apology."**

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27. It is accepted that, on any basis, it would have been inappropriate for Miss Staunton to say that Ms Tuck was attempting to corrupt the evidence. On the basis of what I have described earlier, it seems to me that the interruption made by Ms Tuck may therefore have been a justified interruption. In those circumstances, the Employment Judge's behaviour - although he resorted to raising his voice and shutting out Miss Staunton, and what he said in paragraph 10 of the Judgment was certainly not ideal - was perhaps understandable. His treatment of her must also be seen in the context of other things which he says in paragraphs 10 to 12 of the Judgment. He referred to three instances of Miss Staunton accusing witnesses of lying on oath simply because they had given evidence which was inconvenient to the Claimant's case, without an evidential basis for the challenge. He then referred to the allegation of professional misconduct - which I have been dealing with - and at paragraph 11 he recorded that, "*Miss Staunton appeared to approach the hearing on the basis that the advocates had the right to use all [the time allowed], regardless of whether it was necessary to do so*", and they had to keep reminding her to move on. Also, he criticised her at paragraph 12 for failing to narrow the scope of the Claimant's case and to cover everything in her written submissions. He actually said this:

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> **"12. … We can only assume that she did not allow herself sufficient time to produce a comprehensive document (despite the fact that there were, inclusive of two weekends, one bank holiday and one other weekday when the Tribunal could not sit, six free days between the start of the hearing and delivery of closing argument). The result was that she was forced to attempt to deal with a large part of the dispute piecemeal and in haste with no written**

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foundation on which to build, and our task of doing justice to the dispute was made all the more difficult."

28. When looking at all that, it is clear that the Employment Judge formed a dim view of Miss Staunton's conduct of the case. He cannot be criticised for forming such a view. I think it is fair to say that he may have gone a bit far and a bit hard in his comments at paragraphs 10 to 12, particularly the suggestion in paragraph 12 that Miss Staunton had been lazy, and he may have said more than he strictly needed to about her conduct. However, I do not think that the fact that he has gone beyond what is required by the strict terms of Rule 62(5) of the **Tribunal Rules** can possibly lead to a conclusion that there was a real possibility of bias. It is common for concerns of Judges about the process and about counsel's conduct to be raised and set out in a Judgment, particularly after a long case. And one has to bear in mind that the Judge does not really have anywhere else to raise these concerns; writing to heads of chambers, still less writing to the Bar Standards Board, does not get very far, in my experience. However, he may have gone, as I say, a little over the top. But the real point here in any event is that hostility shown towards an advocate is not to be equated with hostility towards a party, and that is a point made in the passage which I have quoted from the **Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz** judgment.

29. Therefore, standing back, looking at all the circumstances - including the procedural background, the length of the hearing, the Judgment itself, and the two specific incidents relied on - in proper context, I simply cannot conclude that there was a real possibility that Employment Judge Snelson was biased against the Claimant. Of course, he decided the case comprehensively against her on the facts. In doing so he reached some pretty adverse and quite possibly hurtful views about her; and he used very direct language when he might have been more subtle and gentle. He was clearly exasperated by the way the case was presented and by

the conduct of the Claimant's counsel. But finding against a Claimant, expressing views in robust terms, and being exasperated by the process, do not necessarily indicate apparent bias. In this case, I do not think that a fair-minded and properly informed observer would think that there was a real possibility that the Judge was biased against the Claimant.

30. Regrettably for the Claimant, the appeal is therefore dismissed.