Appeal No. UKEAT/0252/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25th September 2018

Before

THE HONOURABLE LADY WISE

MR D J JENKINS OBE

MR M WORTHINGTON

MRS A A BALAKUMAR APPELLANT

IMPERIAL COLLEGE OF HEALTH CARE NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel)
For the Respondent	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct, procedural irregularity

On the third day of a difficult Full Hearing and after a number of applications by the Claimant's counsel had been refused, correctly, by the Tribunal, an adjournment was granted so that the decisions could be explained to the Claimant. Thereafter counsel made further application for an adjournment for the purpose of filing an appeal to the Employment Appeal Tribunal. The Employment Judge mis-heard counsel and thought that the Tribunal had been misled as to the reason for the earlier adjournment. However, when conveying to counsel that there was no need to mislead the Tribunal as no offence would have been taken had leave to appeal been sought, the Judge used inappropriate and intemperate language, including the word "lie". The Claimant contended that this had raised a real possibility of apparent bias.

Held: In the particular circumstances, the fair minded informed observer would conclude that the Judge's remark, while intemperate and inappropriate, did not raise any general or real possibility of the appearance of bias. The case did not involve the kind of incidental remarks and unwarranted injections of sarcasm that had been the feature of the successful apparent bias claim in **El Faragy v El Faragy & Ors** [2007] EWCA Civ 1149.

Appeal dismissed.

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THE HONOURABLE LADY WISE

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1. In a Judgment dated 27 January 2016, the London Central Employment Tribunal (Employment Judge Gay presiding and sitting with lay members) dismissed the Claimant's claims of unfair dismissal, pregnancy or maternity discrimination, race discrimination, and disability discrimination by association. This appeal, taken by the Claimant, is now restricted to a single but important issue; that of whether a remark made by the Employment Judge in the course of the Hearing to the Claimant's then counsel, Ms Jegarajah, could give rise to a conclusion of apparent bias.

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2. Before the Tribunal the Claimant was represented by two counsel, Ms Jegarajah and Mr Knight. She was not represented in these appeal proceedings other than first at a Preliminary Hearing when Mr Stanley Jeremiah, Solicitor, represented her through the *pro bono* scheme, and now this morning by Mr Matovo who has tendered a skeleton argument and additional authority as he has only recently been instructed. Despite that, Mr Matovo seemed to have been able to familiarise himself well with the relevant facts and legal arguments for this Hearing. The Respondent has been represented both before the Tribunal and on appeal by Mr C Edwards of counsel. I will refer to parties as Claimant and Respondent as they were in the Tribunal below.

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The Tribunal's Judgment

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3. The Tribunal's Judgment runs to some 50 pages, nearly all of it is concerned with the substantive issues that were in dispute between the parties. The part of the Judgment to which this appeal relates can be found at paragraphs 39-45 inclusive. They narrate the circumstances of an application for an adjournment which followed immediately after record two previously unsuccessful applications by Ms Jegarajah the second of which was to admit additional late

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evidence in the form of a tape and relative transcript. The reasons for the refusal of that application are set out in detail between paragraphs 22 and 38 of the Judgment and need not be repeated here. Paragraphs 39-45 are in the following terms;

> **"39. After we had given our ruling, with reasons, in respect of the matters set out above Ms Jegarajah asked for an adjournment of 10-15 minutes to explain our ruling to the Claimant. The Respondent was reluctant for there to be an adjournment, because he had witness present who could be taken today, but the Tribunal determined to grant it and did so. Inevitably, the time extended and more went by as we tried to find a clerk to notify the parties to return, but the parties did come back.**
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> **40. At that stage I heard Ms Jegarajah say (and I was subsequently informed that so did another member of the Tribunal and the third heard something consistent with it) that Ms Jegarajah had asked for that adjournment to file an appeal (meaning the last adjournment). I responded with words to the effect: *You could have told me, there is no need to lie* [about the reason for requesting an adjournment]. It transpired that we had misheard. Ms Jegarajah had said words to the effect that she was now asking for an adjournment in order to lodge an appeal, whereas we had thought she was telling us that she had done it. She objected, she said, to being called a liar. We explored what had happened. Ms Jegarajah accepted that I had not called her a liar and we more or less agreed the words set out above. By those words, I meant to indicate that the Tribunal does not take offence at being told that our judgment is to be impugned by way of an appeal: she could have told us the real reason without fear.**
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> **41. Ms Jegarajah made her intended application for an adjournment in order to present an appeal in respect of the non-admission of documents. She wanted the Tribunal's written reasons in order to proceed with the appeal on the basis that all our decisions or rulings were unlawful and '*Wednesbury*' unreasonable,' which we take to be a reference to administrative law principles. She wanted to resolve the issue now, before it was too late in respect of the admission of the documents and the cross-examination of the witnesses on relevant issues in them. She added that the general principles which apply would be the standard fair hearing norm. This was an interim application and for the hearing to go ahead now with the Tribunal as presently constituted would be wrong for reasons already given. In particular, the remedy which the Claimant sought by appeal would be defeated by the fact that the hearing was proceeding or had proceeded. The usual principles would militate in favour of an adjournment otherwise the remedy which could prevent injustice, as she had particularised, would be impossible. She added that the Claimant was distressed and friends close to her were shocked and concerned in particular that Ms Jegarajah had been told that she need not lie. This was a significant additional point which indicated a breakdown in the relationship between the Claimant's representative and the Tribunal, or at least the Judge. Further, she criticised my use of the word fearless in respect of both counsel and the judiciary. She said that it was for the Bar to be fearless: the Tribunal has to be judicious. This was an exceptional case, the application for adjournment was not made lightly and they wished to pursue it.**
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> **42. The Respondent objected to the application. The hearing should proceed, with the witnesses who were present giving their intended evidence. It would disrupt the entirety of the hearing if there were an appeal now, because it would take time to get the Tribunal's reasons typed and presented to the Employment Appeal Tribunal. The Claimant, the Respondent's submitted, would not be disadvantaged by continuing with the hearing because if the Tribunal were wrong, and she lost, on an eventual appeal the judgment would be set aside. As matter a general principle a case was not stayed unless by an Appellate Court or by a decision by an Employment Tribunal when there was an interlocutory appeal. In the present case it would be wrong to order such an adjournment when his witnesses were here and it was distressing for them to have the matter hanging over them and not to be to continue with and conclude it. He submitted that the case could be concluded in the time available. For these reasons the Respondent objected to adjournment.**
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> **43. The Tribunal deliberated and gave our decision thereafter. On balance we are satisfied that we should continue with this hearing. This is no bar to any application to appeal at any appropriate time. Applications are made on paper and that can be done on the Claimant's behalf. However, we consider that it is not fair to the Respondent and the Respondent's witnesses and not consonant with the interests of justice, this case having been listed for some time and the Tribunal lists, here at least, being quite busy, for the case to be adjourned indefinitely. Since the Tribunal has an open mind on the merits of this case, the Claimant may**

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yet be satisfied with the outcome of the hearing. There is a reasonable prospect of that. If so, no appeal would be necessary and the Claimant's fear that any remedy sought would be defeated would not be legitimate. Of course if she unsuccessful, all possible appeals are open to her. The adjournment application is not stronger because it is made on the basis of 'unlawful rulings' or '*Wednesbury* reasonableness.' The Tribunal applied what it understands to be the law on the basis of the facts to issues that were before it. In respect of Ms Jegarajah's submission that this problem arises from the lateness of the Tribunal's decisions on the matters, we can only say that that is because the tapes were disclosed so late. It is regrettable that that haunts the further conduct of the case.

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44. In respect of the mishearing that led to my initial exchange, above, with Ms Jegarajah, I expressed my regret that the misunderstanding occurred. The Tribunal has had some difficulties hearing what Ms Jegarajah was saying, concentrate as we do. I further expressed the Tribunal's agreement with Ms Jegarajah's submission that the Tribunal is to be judicial in its approach. However, we are also not to be cowed by allegations of bias made against us or intimations of appeal. We must still properly manage the hearing and make decisions: that is the sort of the thing I meant by fearless.

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45. The application for adjournment is refused. We considered that it being 4.35pm we must adjourn for the third day and start tomorrow at 10am with the evidence of Ms Brown or Ms McHugh as the Respondent considers appropriate. It is anticipated that such evidence will be concluded in time to make progress with another witness tomorrow, hoping to make up for some two days lost on these applications.

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4. When this appeal was lodged there were also general allegations of procedural impropriety, including one of hostility on the part of the Employment Judge but the Preliminary Hearing Judge (HHJ Eady QC) did not permit these to proceed to this Hearing. On the single issue that is now the subject of the appeal the Preliminary Hearing Judge, in a recorded Decision on 26 April 2017, was satisfied that the Judgment of the Tribunal provided a reasonably accurate record of what occurred, and I proceed on that basis also. There was one exception to that, contained in the record of events provided by one of the lay members, Ms McLellan, who having referred to her notes explained that her record of the, "lie" incident was in the following terms;-

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"There is only one point at which my note is in any way at variance with the account in the judgment. That is at the point in the hearing which is dealt with in paragraphs 39 and 40 of the judgment.

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My note is that when the hearing re-convened at about 1.50pm on 2.12.15 and the Tribunal gave their decision on Ms Jeyarajah's application that it recuse itself and that it admit the transcripts and tapes referred to above, Ms Jeyarajah requested an adjournment of fifteen minutes to explain the decision to her client.

An adjournment of ten minutes was granted.

At 3.00pm counsel and parties returned without the claimant and Ms Jeyarajah said that she had an application for an adjournment to appeal to the EAT.

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The judge responded something to the effect that she (Ms Jeyarajah) could have told her why she wanted the adjournment and added, 'You don't have to lie'.

It was clear that the judge had misheard Ms Jeyarajah and Ms Jeyarajah the explained that she was asking for an adjournment to file an appeal now and required written reasons for the

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decisions just made. The Judge then pointed out that it would take some time for the reasons to be typed.

Ms Jeyarajah claimed that the Judge has accused her of lying and alleged that it had strengthened her case for the Tribunal to recuse itself at which the judge repeated that she had said "There is no need to lie" and that she had misheard Ms Jeyarajah.

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Respondent's counsel submitted that the fairest and most practical approach would be to continue with the case and submit the appeal after final judgment if appropriate. After an adjournment for the judge to consider law and procedure precedents in Harvey the latter was the course the Tribunal adopted and the application for adjournment was refused.

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In my opinion this was the only incident in the hearing which could possibly have given rise to a bona fide perception of bias and in fact was made quite clear to Ms Jeyarajah that it arose from the judge mishearing what she had said and believing that she had misled the Tribunal in her reason for asking for the fifteen minute adjournment. This was against a background of Ms Jeyarajah's own conduct of her case before that point which had involved multiple applications and submissions of little or no merit and her manner which was exceptionally assertive to the point, at times, of appearing aggressive and hostile to the Tribunal."

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5. Against that background and taking account also of the notes of the incident recorded by Mr Knight, second counsel for the Claimant before the Tribunal, (noted in full in the Preliminary Hearing Decision at paragraph 16) Her Honour Judge Eady expressed the view that there was little difference between the parties as to what was actually said by the Employment Judge. Having considered all of the material provided, I can confirm that I have reached the same conclusion, although we have also now had the benefit of notes taken at the time by the Respondent's solicitor and also by Mr Edwards. Accordingly, the real issue for consideration is whether, even taking account of context, the use of the word "lie" by the Employment Judge and directed at one of the Claimant's representatives is sufficient to give an appearance of bias.

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Submissions on behalf of the Claimant

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6. Mr Matovo explained that there was nothing substantial between the parties in relation to the law and that the appeal concerned how that law was applied to this situation. He commented however, that so far as **Article 6 ECHR** is concerned, it was important that all of the rights to a fair Hearing, a public Hearing, and a Hearing within a reasonable time were distinct from the right to a Hearing before an independent and impartial Tribunal. This meant that a complaint that one of the rights is breached cannot be answered by showing that the other rights were not

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breached. Reference was made to **Porter v Magill** [2002] 2 AC 337 at 488-489. Mr Matovo also placed some emphasis on the Decision of the Court of Appeal in the case of **El Faragy v El Faragy & Ors** [2007] EWCA Civ 1149. He submitted that the case of **El Faragy v El Faragy** was closest on the facts to the present one because the statements were made by the Judge himself. He referred in particular to paragraphs 26-31 of that Judgment.

7. Turning to the facts and context of the present case, these were that there had been an initial application that the Judge recused herself based on allegations of hostility that had been refused. It was said that this was an important part of the context in considering what would be known to the fair-minded observer. It was accepted that the decision not to recuse must be regarded as a correct one, but the Judge should have been conscious of that background. The second application was for admissibility of documents and that was refused. The first adjournment in question was to explain the outcome of that application to the client, and then came the exchange with which this appeal is concerned. It is clear that counsel sought the second adjournment in order to appeal to the Employment Appeal Tribunal.

8. In relation to the issue of what was said and what the Employment Judge should be deemed to have heard, Mr Matovo referred to paragraph 40 of the Judgment; Mr Carroll's note; Ms McLellan's note; Mr Edward's notes taken at the time; and his solicitor's note. He contended that even if there was a mishearing of some kind, it was indisputable that the Judge's reaction had been an extraordinary one because she had accused counsel of lying, just because the requests made appeared to her to be, "out of kilter" with what had gone before. Mr Matovo submitted that there would have been so many ways of raising this with counsel without accusing her of lying or being a liar. The Employment Judge could have just asked her to repeat what she said and pointed out the perceived inconsistency. He submitted that nothing counsel had said had

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prompted such a hostile response. There was nothing to justify what he described as a very aggressive and extreme response from the Judge. The agreed words used were, "There is no need to lie'. There could be no room at all to interpret that as anything other than an attack on counsel.

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9. He submitted that the fair-minded and informed observer would take into account that this was a sensitive case, including a complaint of racial discrimination, and that the Claimant and her counsel were both Sri Lankan. He accepted that there was no racial content to the words under discussion, but he said it was relevant at whom they were directed. He said that in cases involving the appearance of bias, what an onlooker would think about the context had to include ethnicity. Further, the barrister in question was an experienced one, having been called to the Bar in 1993, and the allegation made against her was very serious. Judges should be very slow to make an allegation of this kind where the issue was uncertain and could easily be clarified.

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10. Counsel pointed out that the Judge's explanation appeared to be that she meant that the Tribunal did not take offence at being told that the Judgment was to be impugned by way of an appeal, but the question arises as to why she did not say that to counsel, rather than making an unwarranted attack. In **El Faragy v El Faragy** the comments made by the Judge were criticised by the Court of Appeal as unwarranted because there is no need to slip in remarks that were not necessary to make a point. In anticipation that general comments about the wider context would be made on behalf of the Respondent, Mr Matovo submitted that these were not relevant because whatever had happened before, there was already a feeling that the Judge should have been even more conscious than usual about uncontrolled remarks. He submitted that the general background was relevant to the extent that what had already occurred would make an independent Judge sensitive, such that they would hold off from making unwarranted remarks and the observer would pick up on that.

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11. It was pointed out also that Ms McLellan was not the subject of the complaint, albeit that she had been on the bench. It was said to be noteworthy that where normally you would expect lay members to support the Employment Judge, Ms McLellan had made an adverse comment. He accepted, however, that the members of this Tribunal were the only arbiters of what a fair-minded observer would find.

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12. In summary, counsel submitted that there was nothing said in this case by counsel for the Claimant that in any way triggered or invited the comment that the Judge made, even a mishearing, would not justify such an extreme allegation. People commonly mishear, but it was rare for somebody to be accused of being a liar as the response to that and an observer would have some insight into how the courts work. Mr Matovo submitted that the single ground of appeal should be upheld and the case remitted back to a fresh Tribunal for a rehearing.

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Submissions on behalf of the Respondent

13. Mr Edwards began by noting that there were various different records of the specific words used, but that what was clear was that the Judge had misheard Ms Jegarajah's submission and no point could be taken, as seemed to be taken, that the Judge ought to have heard something different because some of the others in noting the event had done. In terms of context, the application to admit documents had been unsuccessful on the previous day. Claimant's counsel had made the application again and that reconsideration application had been unsuccessful. Indisputably the first adjournment was sought to explain the effect of that to the Claimant. Mr Edwards had opposed that proposal as a waste of time in a situation where the application had already been refused previously and so did not have to be explained a second time to the client. When counsel returned back late to court and made a second application for adjournment to appeal the decision not to admit documents, the Judge misheard and thought she said, "I had

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A made an application to adjourn to appeal" as opposed to having that adjournment to explain matters to her client. The situation was confusing, and Mr Edwards own notes confirmed that.

B 14. Looking at the narrow context of the words used, that included only the remark made by the Judge in response to the submission. However, Mr Edwards submitted that what was required was consideration of what happened before and after that narrow context. He submitted that it was necessary to consider the remarkable conduct before the incident, including the fact that there C was a lack of progress in the case by day three, and that the conduct of both counsel representing the Claimant had been unusual. It was described by Ms McLellan as being that of involving multiple applications and submissions of little or no merit and a manner, certainly on the part of D Ms Jegarajah, which was, "*exceptionally assertive to the point at times of appearing aggressive and hostile to the Tribunal*". All of that had taken place immediately before the incident under discussion in this appeal, which related to the use of what Mr Edwards described as florid E language on the part of the Judge. He submitted that the fair-minded observer would have been in the room and realised both that the acoustics were not good, the room having a high ceiling where one has to speak loudly and also that Ms Jegarajah, while hostile and aggressive, was softly spoken. The issue of the difficulties with hearing in the room had been raised in the context of F the argument about the tapes.

15. Mr Edwards submitted that the observer would know all about the run up to the remark G objected to. Whether the observer heard what the Judge heard or what Mr Knight has recorded does not matter because what is indisputable is that the Employment Judge said, "there is no need to lie" and so the observer would understand that this was a forthright, florid comment in the face H of what, so far as the Judge understood it, had just occurred. Mr Edwards submitted that in, "judicial code" the words used by the Judge meant the same thing as suggesting to counsel that

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she appeared to have deliberately misled the Tribunal over the reason she sought for an adjournment and that for a barrister to mislead Tribunal was a serious matter, but that there was no reason to do so because the Tribunal would not take offence at its Judgment being impugned.

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16. He contended that if a barrister is being accused of deliberately misleading the Tribunal, that was the same thing as lying to the Tribunal and that is what the Judge, albeit wrongly, thought had occurred. While there were judicial conventions as to how things were normally expressed,

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it should be borne in mind that the fair-minded observer is not unduly insensitive or suspicious and understands that, “There is no need to lie” and means exactly the same as the expression as articulated by Mr Edwards in the preceding paragraph and described as ‘judicial code.’

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17. Turning to the immediate context after the incident, it is clear that after counsel for the Claimant reacted, it became apparent that the Judge had misheard, the Judge expressed regret for

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the misunderstanding (paragraph 44 of the Judgment) and so the informed observer would know that these misunderstandings occur and would accept the Judge’s expressions of regret. In terms of what weight to place on the Judge’s note about her own view of whether she was biased, and also that of the lay members, Mr Edwards submitted that no weight should be given to any of

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them in accordance with the accepted authority of **Facey v Midas Retail Security Limited** [2001] ICR 287, at paragraph 38.

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18. As far as Ms McLellan was concerned her note had to be seen in context. She had set out the uncontroversial facts and then expressed her view that what occurred, could possibly give rise to some *prima facie* perception of bias but went on to explain that it had arose from mishearing

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on the part of the Judge. Nothing, she said, should be taken as being supportive of the Claimant’s position and in any event, she was not a fair-minded observer as such, but a participant.

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19. Mr Edwards summarised the law, in particular the cases of **Porter v Magill**, **Helow v Secretary of State for the Home Department & Another** [2008] 1 WLR 2416, paragraphs 1-3 and **Virdi v Law Society** [2010] 1 WLR 2840. As far as the case of **El Faragy v El Faragy** was concerned, Mr Edwards submitted that this was quite different in terms of the magnitude of

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the comments made. In this case, the comment was in point to what had occurred, albeit made in florid language. He observed that Mr Matovo's submission seemed to rely on the informed observer making some racial connection between the Claimant's counsel's ethnic origin and that

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of the Claimant, a matter that has not been raised earlier in this case. In any event, a fair-minded observer would not regard that as relevant.

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Discussion

20. The law on apparent bias has been clarified and refined by courts of the highest authority starting with the decision of the House of Lords in **Porter v Magill**. There, Lord Hope enunciated

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the legal test to be applied as follows, "*The question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased*". In the subsequent decision of **Helow v Secretary of State for the Home Department & Another** [2008] WLR 2416 Lord Hope developed the concept of the hypothetical

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fair-minded observer. He explained that:

> **"1 The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.**

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> **2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.**

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> **3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."**

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21. Lord Hope added that the context is crucially important in a case where bias is alleged. In **Helow v Secretary of State for the Home Department & Another** the allegation of bias, on the part of a Scottish High Court Judge, rested entirely on her being a member of the International Association of Jewish Lawyers and Jurists. The publication issued by the association contained some articles that were fervently pro-Israeli and markedly antipathetic to the Palestinian Liberation Organisation. However, the Judge in question had said and done nothing to associate herself with those views, something on which considerable reliance was placed by Lord Hope at paragraphs 5 and 18, Lord Cullen at paragraph 29, and Lord Mance at paragraph 53. The present case involves something admittedly said by the Employment Judge and so the context is very different. The case of **El Faragy v El Faragy** [2007] EWCA CIV 1149 on which Mr Matovo relied is an example of an apparent bias claim where the Judge himself made remarks that were incidental and unwarranted injections of sarcasm, and so would have caused sufficient concern on the part of the fair-minded and informed observer, such that a situation of apparent bias arose. I will return to that case in more detail.

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22. A more recent exposition of the test of the fair-minded observer can be found in the decision of the Court of Appeal in **Virdi v Law Society** [2010] WLR 2840. In rejecting a contention of apparent bias on the part of a solicitor's Disciplinary Tribunal that had invited a clerk to the Tribunal to retire with it when it considered its decision, and to assist it in drafting its findings and decision, Burton J gave four Reasons for rejecting the submissions for the Appellant;-

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> **"43…. The first is that the informed observer is not a real person. He is not referred to in Article 6. He is only a construct, a tool, a hypothetical conception posited in order to assist the Court in deciding whether the proceedings in question were and were seen to be fair, as required by Article 6 and common law. I am reminded of what Lord Radcliffe said of the reasonable man, in a different context, in *Fareham UDC v Davis Contractors Ltd* [1956] AC 696, [1956] UKHL 3.**
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> > **… the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself.**
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> **Similarly, in *Locabail v Bayfield Properties Ltd* [2000] QB 451, 477 the Court of Appeal referred to the court "personifying the reasonable man". The ultimate question is whether the proceedings in question were and were seen to be fair. If on examination of all the relevant facts, there was no unfairness or any appearance of unfairness, there is no good reason for the imaginary observer to be used to reach a different conclusion.**
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> **44. My second reason is that the imaginary observer is fair-minded. A fair-minded person would not reach a conclusion that a tribunal was biased or appeared to be so, without seeking to obtain the full facts and any explanation put forward by the tribunal.**
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> **45. My third reason is that if the challenge to the impartiality of the tribunal had been made at the time, i.e. to the Tribunal, it would have been able to and would in fact have put the full facts before the Appellant. There is no good reason why the Appellant should be in a different, and better, position to challenge the Tribunal before an appellate court after the Tribunal has given its decision.**
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> **46. My fourth reason is that Mr Beaumont has suggested no sensible criterion to distinguish between the facts that may, on his submission, be considered in determining whether the Tribunal was apparently biased and the full facts. He suggested that the restriction is to facts that are publicly available, and in the present case included only the facts on the Tribunal's website stating that the clerk to the Tribunal is an employee of the Law Society seconded to the Tribunal. But the relevant facts cannot be restricted to what the Law Society, which on the Appellant's case is a party to the disciplinary proceedings, or indeed anyone else, chooses to put on its website. Facts that point to bias (for example, that the clerk was a former employee of a victim of alleged professional misconduct) may not be publicly available; once such facts are disclosed, so must other facts relevant to the relationship between the clerk and the victim. Moreover, what is publicly available? Are facts that would be obtained on inquiry of the Law Society "publicly available"? In my judgment, for present purposes they are, and I have no doubt that all the facts now before the Court would have been disclosed by the Tribunal if asked. An obvious example is the memorandum of understanding with the Master of the Rolls to which I have referred. It is not a secret or confidential document, but it has not hitherto been available on the Internet. The document is held by the Tribunal, and if it had been challenged, I have no doubt it would have been produced."**

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23. It is well-established, however, that a Judge's own evidence on the issue of whether she has been biased or prejudiced will be disregarded. In **Locabail (UK) Ltd v Bayfield Properties Limited** [2000] QB 451, the Court of Appeal confirmed (at paragraph 19) that a reviewing court would not pay attention to any statement by the Judge complained about in relation to the central issue because the insidious nature of bias renders such a statement of little value. That statement was described as, "categoric" in the subsequent Employment Appeal Tribunal Decision in **Facey v Midas Retail Security Limited**, [2001] ICR 287 at paragraph 38. It was in reiterated that any evidence by a Judge on secondary matters (as distinct from primary facts), such as whether he

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has been biased, prejudiced or rude, impatient, or arrogant is to be disregarded. It is for the appellate tribunal to determine whether a real possibility of bias arose.

24. On the undisputed facts of this case, the Employment Judge used the word, “lie” in remarking to counsel that she should not give one reason for seeking an adjournment, (to explain to her client what had just been decided in relation to an application to admit evidence late) if in fact the adjournment was for a different purpose (to discuss whether to appeal the decision). The context in which the term, “lie” was used was that the Employment Judge misunderstood the basis on which the fresh application for an adjournment was being sought. The first adjournment had been taken had been to convey the decision to the client, but a second adjournment was then requested in order to file an appeal. Paragraph 40 of the Tribunal Judgment provides the detail of the particular circumstances and the specific words used, namely, “there is no need to lie”. One of the Tribunal members, Ms McLellan noted the Judge as saying, “You do not have to lie”, but nothing turns on that slightly different note.

25. Similarly, the fact that Mr Knight’s notes coincide with those of Ms McLellan about what counsel said about the second adjournment, do not matter. The Judge misheard the submission and this appeal has proceeded on the basis that this cannot be doubted. The implication of what was said was clear enough. The Judge having not understood that the Claimant’s counsel’s submission was consistent with the earlier reason for adjournment, having not been to file an appeal but simply to discuss matters as previously submitted, appears to have reacted as she did because she thought that a legal representative had deliberately misled the Tribunal as to the true reason for the first adjournment. The question is whether in that context the use of the word “lie” was so inappropriate and unfair that a fair-minded observer would conclude that there was a real possibility that the Judge was biased.

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26. It seems to me that any fair-minded observer would take into account the following important factors:

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1. The context of the procedure that had taken place on the first three days of the hearing in particular the previous day, day two, and the day of the incident, had day three, included first an application that the Tribunal recuse itself and secondly two applications to receive documents, including lengthy transcripts. These applications were refused, correctly, with detailed reasons and after due consideration.

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2. The Tribunal had already recorded that they had already found difficulties in hearing some of what was being said in the Hearing (paragraph 37).

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3. No witness was giving evidence on day three of this Hearing, and so the exchange took place in a procedural rather than a substantive evidential context.

4. The Employment Judge had mis-heard the Claimant's counsel and so genuinely believed that the Tribunal had been deliberately misled.

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5. A Judge who considers that a barrister has deliberately misled the Tribunal on any issue is likely to feel bound to challenge counsel on what appears to have occurred.

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6. While all Judges should be more careful in their use of language than the Employment Judge was on this occasion, the remark made by her made clear that she would not have taken offence had the real reason (as she thought it was) for the adjournment been disclosed.

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7. The misunderstanding of what counsel had actually said was cleared up at the time, almost immediately after the remark was made, with the Judge expressing regret for her error.

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8. The context of the incident was a difficult Hearing at which the Claimant's softly spoken counsel had sought two adjournments in quick succession, the Tribunal having granted some indulgence to her by permitting the first adjournment.

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9. While the case was a sensitive one, the Claimant's rights and interests were being protected by two counsel.

10. The Tribunal was sitting as a bench of three and the lay members (who might have felt duty bound to intervene had they been concerned about any impression created) supported the Employment Judge's account of the incident by participating in the written Judgment, including in particular paragraphs 38-45 inclusive, which are in agreed terms.

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27. I do not place any reliance on the Judge's own position on the allegation and neither would the fair-minded observer. As far as Ms McLellan's note is concerned, all she does acknowledge is that in her view, only the making of this remark by the Judge could possibly fall within the category of bias no doubt as distinct from the other issues that were live when she wrote her note. That it could do so was acknowledged by HHJ Eady QC in permitting a Full Hearing so that argument could take place on whether that possibility was a real one. It is noteworthy that, having recorded at least the theoretical possibility herself, Ms McLellan then balances that in her note by pointing out that all that had occurred was a mishearing of what counsel had said and that against a background of what she (Ms McLellan) regarded as unsatisfactory conduct on counsel's part that bordered on hostility to the Tribunal. I do not read Ms McLellan's report as supportive of the Claimant's allegation. Even if it had been, that would not have been in any way determinative of the issue, standing that as part of the bench of three Ms McLellan was more in the role of decision-maker, and certainly not merely an observer see **Locabail (UK) Ltd v Bayfield Properties Limited**.

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28. One of the issues that was between the parties' legal representatives in submissions at this Hearing was whether or not the Employment Judge directly accused the Claimant's counsel of

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being a liar. There is a significant difference between saying to someone, “You are lying” or, “You are a liar” and telling someone that they, “Do not need to lie”. The latter expression carries with it a conditional feature - namely that if, as in the circumstances of the present case, a proposed appeal was the reason for the previous adjournment, there was no need to mislead the Tribunal into thinking that it was for some other reason.

29. The use of intemperate or infelicitous language by any Judge is not something that any appellate tribunal could condone. A distinction requires to be drawn, however, between careless or tactless expression on the one hand and an appearance of bias on the other. Set in context, I conclude that the Employment Judge’s remark falls into the former category and that is how it would be regarded by a fair-minded informed observer. The use of the word “lie” was both inappropriate and regrettable, but was based on a subsequently and promptly acknowledged error as to what had been stated, and in the context of the Tribunal having granted some indulgence to the Claimant’s side in the face of opposition on the part of the Respondent. The Judge was required to confront what she thought was an attempt to mislead. She should have done so more gently but her challenge was not incidental or sarcastic; it was highly germane to the issue before her and was said in error.

30. The facts of this case are very different from those in **El Faragy v El Faragy** where the Judge had made four separate remarks that were, on their face, racially offensive albeit without intention. In the central part of the decision in that case, the Court of Appeal narrated (at paragraphs 28 and 29) the words spoken by the Judge with the offensive parts highlighted and then stated, “*without the additional words, the Judge was making fair points, but the incidental injections of sarcasm were quite unwarranted*”. Ward J goes on to accept a description of the remarks as, “*mocking and disparaging*” of the litigant in question.

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31. In the present case the expression under attack, "You do not need to lie" contains no gratuitous or incidental offence. It contains two elements, first, an allegation that the reasons stated by counsel for the first adjournment had been untrue and, secondly a direction that the Tribunal could have coped with the truth at the outset. The second part is unobjectionable; the first contained intemperate, inappropriate language indicative of poor handling of a single issue but that in the wider context already outlined above.

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32. I reject the contention that the fair-minded observer would consider that the ethnicity of the Claimant in her counsel was of note. She (the observer) would be free of any discriminatory attitude herself and would not wrongly suspect a racially charged atmosphere where nothing in the material available to her or her observations suggested that that was a relevant factor. The lay members of this Tribunal also wish to stress that the composition of the Employment Tribunal of a bench of three, is an important matter. All three deliberated together on each of the procedural issues that arose and neither of the lay members had any cause for concern at the time. Further, as recorded at paragraph 40 of the Judgment, counsel for the Claimant herself appeared to accept, on the day, that the Employment Judge was not calling her a liar.

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33. In all the circumstances, I have reached the view that the fair-minded informed observer would conclude that the Judge's remark was uttered during an unfortunate episode in the context of a longer and difficult case in which progress had been impeded by a number of unusual and correctly refused applications, after very little evidence had been led. Placed in that context, she would have concluded that this single inappropriate remark did not raise any general or real possibility of the appearance of bias. The appeal is dismissed.

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