



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs E Gomez-Campos

v Royal National Orthopaedic Hospital
NHS Trust

Heard at: Watford

On: 16 May 2019

Before: Employment Judge Henry

Appearances

For the Claimant: Mr D Stephenson (Counsel)

For the Respondent: Mr R Moretto (Counsel)

A DECISION ON APPLICATION FOR RECUSAL

1. On application of the claimant that the panel recuse itself on members having been overheard to have made comments, giving rise to an appearance of bias, the panel has recused itself.
2. The matter is relisted for hearing before a new panel at **the Employment Tribunal Watford, 2nd Floor, Radius House, 51 Clarendon Road, Watford WD17 1HP**, to start at 10am or so soon thereafter as possible on **14 October to conclude on 28 October 2019**. The parties are to attend by **9.30am**.
3. The length of hearing has been revised and is agreed that the hearing will be completed within 11 days. On the following timetable:
 - 3.1 The first 2 days for reading in time for the tribunal and to address any preliminary matters.
 - 3.2 A maximum of 7 days for oral and other evidence on liability, the time to be apportioned as to:
 - 3.2.1 2 days cross examination of the claimant and five days cross examination of the respondent's witnesses.
 - 3.3 A maximum total of 1 ½ hours, 45 minutes for each party, for submissions on liability.

- 3.4 Approximately 2 days for the tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons and deliver judgment with reasons if possible.
- 3.5 Should the claimant be successful in whole or in part and issues of remedy arise, the matter will be set down for a preliminary hearing and direction necessary therefor given on the determination of merits of the case.

REASONS

1. On the hearing having been set down for 10 days, which was then reduced to 8 days owing to judicial resources, following 1 ½ days of the tribunal reading in and 1 day cross examination of the claimant, it was brought to the tribunal's attention that a witness for the respondent had overheard words of a negative nature by the tribunal members as they travelled to the train station following the hearing of that day which were scribed to a reference to the claimant which, if correct, potentially showed a bias towards the claimant.
2. On enquiries being made as to exactly what was overheard, and on enquiries made of the panel members as to their recollection of events the afternoon before by which they were able to give a relatively full account of the discussions they had as they walked the short distance from the tribunal to the train station for which there was then no occasion for them to have made reference to the hearing or otherwise the claimant, they could not be certain that they did not utter the words referenced, albeit they could not identify a context in which such words would then have been used.
3. [The words used – she clearly doesn't like being told what to do]
4. Mr Stephenson, on behalf of the claimant, makes application for the members to be recused on grounds of apparent bias, on grounds that the reported statement having been made known to the claimant, demonstrated:
 - 4.1 A view had been formed as to a matter of evidence relevant to a determination of the issues in the case, and
 - 4.2 Members had formed an unfavourable view about the claimant,
 - 4.3 Members had formed an unfavourable view about the claimant's evidence for that the respondent's witness, having been clear about what had been said albeit not the context. Is a different position from one on which an application is based premised on a claimant's witness or claimant in support of their case in that it was the respondent's witness who overheard the comment believed to be

about the claimant and that the tribunal should therefore err on the side of caution against the perception of bias.

5. Applying the test set out in Porter v Magill [2002] 1XX ER 465, that the test for apparent bias is whether the relevant circumstances, as ascertained by a court, would lead a fair minded and informed observer to conclude that there was a real possibility of bias.
6. Mr Stephenson further advanced his application on the grounds that as only one days evidence has been heard and on it having been determined that the matter was to go part-heard on the reduced time available for hearing owing to judicial resources, and that the hearing would as a consequence have to be relisted, it was then in the interests of justice and in further of the overriding objectives of the tribunal to postpone the matter at this juncture with minimal impact on resources and the conduct of the case that the interests of justice is best served by the panel being recused because of the perception of bias and the matter set down for a hearing before a newly constituted panel and the next available opportunity.
7. The respondent readily acknowledged the perception of bias on the issue being raised by their witness and do not object to the application where it is imperative in the interests of justice that there be confidence in the proceedings, that in the circumstances there is a risk that were the matter to continue, the parties may not have confidence in its proceedings and, ultimately, the tribunal's findings for which any ensuing appeal, if successful, would result in the remittance of the case for rehearing where, at present, on the tribunal having received one days oral evidence, to end proceedings now and list before a new panel would be in the furtherance of the tribunal's overriding objectives to deal with cases justly and proportionately for which they do not oppose the claimant's application.

The law

8. The relevant test on a consideration of apparent bias can be gleaned from the case of Porter v Magill [2002] 11 ALL ER465 (House of Lords), that the test for apparent bias is whether the relevant circumstances, as ascertained by a court, would lead a fair minded and informed observer to conclude that there was a real possibility of bias. A fair-minded observer is imputed to be someone having knowledge of the case, but not merely have made a brief visit to the court, be aware of the tradition of legal independence, being someone who is not wholly uncritical of the legal culture and system, but equally someone who is neither complacent nor unduly sensitive or suspicious. They must also be in possession of the relevant facts.

Conclusions.

9. I am conscious of the members being experienced members and are aware of the need to refrain from making determinations on the case prior to its conclusions and of discussing tribunal matters outside of the tribunal hearing room. I am also conscious of members having a good recollection

of their discussions as they walked to the train station from the tribunal for which it is highly unlikely that discussions were being had as regards the claimant or otherwise the hearing. However, on the witness for the respondent, an individual who had been in attendance for the duration of the hearing, and having heard the discussion, had formed the view that the discussion concerned the claimant, although unaware of the context, I am unable to say that a fair minded and informed observer as the respondent's witness was, could not reasonably have held the belief he held, there being no reason why he should seek to support the claimant.

- 10. In these circumstances I believe there is the real possibility of a fair minded and informed observer concluding that there was a real possibility of bias.
- 11. I accordingly grant the claimant's application and recuse the panel and order that the matter be set down before a new panel.
- 12. [NB decision from the whole panel not just judge alone.
Re Port and Magill – per Lord Hope at paragraph 103 that in determining bias the test to be applied 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.”]

Employment Judge Henry

Date: ...6 June 2019.....

Sent to the parties on:

.....
For the Tribunal Office