EMPLOYMENT TRIBUNALS

Claimant: Mr I Laing

Respondent: Bury and Bolton Citizens Advice Bureau

Heard at: Manchester **On:** 17 and 18 February 2020

Before: Employment Judge Grundy
Mr D Wilson
Ms E Cadbury

REPRESENTATION:

Claimant: In person
Respondent: Mr J Searle, Counsel

JUDGMENT

This is the judgment of the Tribunal on 18th February 2020 and ruling on the claimant's application originally stated this morning on paper to be for the hearing to be heard by a male Employment Judge, revised orally at this hearing for the Judge to recuse herself.

1. The ruling on that application is:- the application for the Employment Judge to recuse herself is refused.

2. The review of the decision to decline jurisdiction to hear the claimant's claims of race and sex discrimination due to his failure to pay a deposit as ordered fails and is dismissed and no further order is made.

3. The review of the decision not to make witness orders against Rebecca Potts Jacobs, Emma Davies and Charlie Smythe fails and is dismissed and no witness orders are made.

4. The review of the decision not to re- issue the suspended witness order against Mr Verrachia suspended by the Acting Regional Judge fails and is dismissed and no other order is made.

REASONS

1. The Tribunal is part way through hearing the claimant's claim against the respondent alleging victimisation, the Tribunal having no jurisdiction to consider the claimant's claims in respect of race and sex discrimination as the claimant failed to pay any deposit previously ordered by Employment Judge Franey.

2. The claimant by letter of 17 February 2020 made available to this Tribunal on 18 February requested that the letter be placed for the urgent attention of the Regional Employment Judge. He in that letter stated a complaint against Employment Judge Grundy and pertaining to this hearing also a request for a review on several bases of the judgment given yesterday and thirdly, an application that the hearing is heard by a male Employment Judge/ new Judge. The letter is read into this judgment as if all of the terms of it were set out herein. It is a lengthy letter, which the claimant said, took him five hours to put together over yesterday evening.

3. In that letter the claimant alleges bias against the Employment Judge, both actual and apparent bias when asked to clarify those matters. The Tribunal heard both the claimant in relation to those matters and Mr Searle on the respondent's behalf.

4. The Tribunal also considered a number of the previously decided authorities which touch on the issue of bias, in particular **Locabail (UK) Limited -v- Bayfield Properties Ltd and Others [2000] Q.B.451**, **Magill -v- Porter 2001 UK HL 67**, **Lodwick and the London Borough of Southwark cited by the claimant and Ansar -v- Lloyds Bank and Others 2006 EWCA Civ 1462**.

5. The Tribunal has analysed the substance of the submissions as invited to do by the authorities. First of all, the claimant in the background in the letter suggested that the Tribunal having ruled against him on the Deposit Order the Tribunal hadn't taken into account sufficient matters in relation to the Deposit Order because the Tribunal was only aware of the failure to pay from the claimant's admission.

6. The Tribunal as a tripartite unit of three persons considering the deposit position ruled that the claimant not having paid the deposit within the requisite time should not be able to proceed with his race and sex discrimination claims because the other claims were as a matter of law struck out, which then left the victimisation claim live. The Tribunal did not take into account extraneous matters.

7. The Tribunal also made a ruling in respect of Rebecca Potts Jacobs, Charlie Smythe and Emma Davies who were witnesses whom the claimant sought the Tribunal to issue a witness order against, the Tribunal ruling that it was not necessary for them to give evidence, in part that was because the issues have narrowed because the sex and race discrimination claims were no longer live.

8. It is also right to say that in considering the three witnesses statements which are appended to the witness statement of Miss Gail Lyle, the evidence within those statements is not supportive of the claimant, in fact it would seem that they would be hostile witnesses to the claimant and although the claimant through discussion says that part of the statement of Charlie Smythe may be of assistance to him, that would then not require challenge under cross examination and would not be a reason for the witness to be called to give evidence. The Tribunal also relied on proportionality in making that decision, again it was a tripartite decision of the three members of this Tribunal.

9. That was part of the background to the claimant's concerns of bias. The Tribunal takes on board that the claimant indicated in his view the Employment Judge had not read the papers properly. The situation on the personal attendance of the Employment Judge was that the Tribunal office had wrongly indicated to her as diarised at Friday 14th February 2020 that she was sitting in Liverpool on Monday 17th February 2020 so she attended Liverpool Tribunal in good time for reading papers for a hearing in Liverpool. Plainly when the Judge attended Liverpool at 9am papers were not there and her attendance was required in Manchester. The Judge then drove from Liverpool to Manchester to commence the hearing as promptly as possible. In these circumstances when the hearing first commenced she had read the papers in as much as she was able and to make sure the reading time left available was properly utilised, she therefore took more time from between 12 pm and 2 pm to reread the papers so that she was fully able to deal with all of the issues with her colleagues in order to consider the matters that were before the Tribunal.

10. At 2 o'clock when the decisions were given in respect of the granting of the witness order the Tribunal Judge was well aware and clear about all of the issues, and the same matters applied in respect of the email regarding Mr Varachia's attendance. The Tribunal had not at that time (when making its earlier ruling) seen the email which had been sent by Mr Varachia to the Tribunal which was before Acting Regional Employment Judge Warren who had suspended the witness order requiring his attendance. This was because it had not been printed and placed on the file at that time. The Tribunal has of course now seen that and there are clear reasons why the Acting Regional Judge took the view that his attendance would not be necessary set out later in this judgment.

11. Dealing with the specifics relating to concerns/appearance of bias that the claimant relies upon and that he discussed and amplified on before the Tribunal, the Tribunal's recollection of the claimant's response to Mr Wilkinson was very soon after he (the claimant) had been sworn in to give his evidence, the claimant suggested Mr Wilkinson was smirking. The Employment Judge did comment about perception because she herself had not witnessed anything but what she also did was engaged with the claimant's concern that there was something which had been going in within the Tribunal and she asked all members of the Tribunal and all persons present to behave with decorum, and properly and that was not said directly to any one person, it was aimed at ensuring that everybody behaved appropriately. (Incidentally Mr Wilkinson later changed his seat so he was sitting to the far left of the claimant and well outside his eye line.)

12. Further, in the discussion that the Tribunal has had with the claimant he accused the Employment Judge of dismissing his feelings about personal statements that had allegedly been made. Far from dismissing the claimant's feelings, the Tribunal Judge engaged about that and talked with the claimant during the course of that hearing about having feelings, she did not dismiss them, so in terms of the claimant's concern and complaint that is not accepted by the Tribunal.

13. The claimant goes on in his letter specifically to say "I am greatly concerned that the Employment Judge who is female is overtly sympathetic to the allegations made by the respondent and the female staff members against me, this is based on my observation of the Judge". The Tribunal have yet to hear the respondent's evidence, the Tribunal has only engaged in so far hearing the evidence of the claimant himself. The respondent suggests therefore that this is a complaint of apparent bias based solely on gender and given that the claimant himself says that, one could indeed reach that conclusion.

14. The Tribunal has engaged fully to deal with the complaints that the claimant makes and has fully considered them. At the time the claimant was giving his evidence he suggests that he has been hurried by the Tribunal. In fact, the situation is that the Tribunal was assisting the claimant to give the best evidence he could in the circumstances that although a qualified non -practising Solicitor the Tribunal accepts he is a litigant in person.

15. The Tribunal has in front of it the full witness statement of the claimant, the live issues relate to the victimisation claim, the annex of Employment Judge Franey identified the issues pertinent to that claim, what the Tribunal did was to offer the claimant the opportunity to give any further evidence about those issues that he wished to and again, in an effort to assist him the Tribunal asked specifically that he direct the Tribunal's attention to any particular pages of the bundle of documents he wished to refer, and he did indeed do that and referred to the policies which the Tribunal will consider.

16. So, far from hurrying the claimant the Tribunal was assisting. The claimant had a tendency to return to "festering sores" that relating to the Tribunal's judgment so far as the witness orders were concerned and the dismissal or the deposit order position. The Tribunal Judge is mindful that the evidence now to be considered by this Tribunal is only that regarding the victimisation claim and that is limited in relation to the relevant issues, the claimant has so far not wished to accept that ruling.

17. The claimant's letter also on page 4 and 5 seeks to put forward that the claims should be heard by a different Employment Judge, he says "different" in that paragraph but also in the final sentence on page 4 says "I request this case is heard by a "male" Employment Judge". He started the letter in part 3 of his application by asking that the hearing is heard by a "male" Employment Judge and then goes on on page 5 to request the proceedings be heard by a "different" Employment Judge. When asked about that in clarification by the Employment Judge the claimant said it was an error despite the capitals underlined in the first paragraph. It is concerning that the claimant has re-iterated and then retracted the suggestion that he would wish the claims to be heard by a male Employment Judge.

18. On behalf of the respondent Mr Searle referred us to paragraph 26 of the Lockerbail decision. In particular, quoting as follows "it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias, everything will depend on the facts which may include the nature of the issue to be decided. We cannot however concede circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age/class, means or sexual orientation of the Judge specifically ruling out an objection on the basis of gender. "

19. The Tribunal has also considered carefully the dicta from paragraph 28 of **Ansar -v- Lloyds TSB** and the test that was articulated within the claimant's letter. The test to be applied as stated by Lord Hope in **Porter -v- McGill** at paragraph 103 and recited by Pill **L J in Ludwick -v- The London Borough of Suffolk**. 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. 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. 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 exceeding 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".*

20. Also relevant is a quote from Mason J in the High Court of Australia recited in Locabail. "*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. 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. 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. 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. 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 an adjournment or stay cannot. There shall be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearing 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." "In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal. Whilst recognising that each case must be carefully considered on its own facts a real danger of bias might well thought to arise if there were a personal friendship or animosity between the Judge and any member of the public involved in the case, or the Judge was closely acquainted with any member of the public*

involved in the case, particularly the credibility of that individual could be significant in the decision in the case, and so it goes on about those circumstances where the situation is much clearer."

21. The Tribunal has considered the real danger or possibility of bias and the matters relied upon by the claimant, and has gone through those circumstances with a fine toothcomb. The Tribunal does not accept that the test is satisfied in terms of the informed observer concluding there is a real possibility of bias by the Judge. The Tribunal has acted transparently and openly, engaged in a dialogue with the claimant, given him leeway in his oral evidence which is still continuing and made tripartite decisions on a unanimous basis. In those circumstances the application for recusal is dismissed and the case will continue.

22. This is the claimant's application to review the following decisions. Firstly, in the claimant's terms, the strike out of the applicant's race and sex discrimination claim, secondly, to refuse the claimant's witness order for the attendance of the respondent's witnesses Rebecca Potts Jacobs, Emma Davies and Charlie Smythe and thirdly, refusal of the claimant's request for attendance of the respondent's witness is Mr Verrachia and to proceed with the hearing of the claim. The Tribunal has considered the matters that the claimant has referred to in writing, the claimant having been given the opportunity to make further submissions orally, and choosing not to do so and dismisses the application to review those orders. In the first instance the reasons are as follows.

23. The Tribunal has previously given reasons for not allowing the race and sex discrimination claim to proceed in fact because of lack of jurisdiction given that the claimant failed to pay the deposits ordered. This judgment is to be considered in relation the original judgment on that matter. The Tribunal would add, which was considered with the claimant in earlier discussion today is that the amounts ordered to be deposited were £10 in respect of the race discrimination case and the sex discrimination case, both of which were extremely small sums.

24. The claimant in his letter says that his failure to pay was due to "an oversight" (and the oversight was, and this is new information,) due to my personal circumstances relating to my child and on-going stress that I had been suffering as a result. The claimant is a qualified Solicitor, although not practising, and he has been employed as an immigration advisor in his last post. He is articulate and intelligent. He has at no time previously sought an extension of time to pay. He had the clear information attached to the notice of payment of a deposit and the Tribunal has looked at this new reason and does not find it a compelling reason to alter its previous decision.

25. So far as the refusal to make witness orders in respect of the three individuals the Tribunal has given previous reasons for that and the only matter to add that the claimant has raised in discussion in the original application for recusal of the Judge is that some of the matters in Charlie Smythe's statement appear to support him. If that is correct there is even less reason for a witness order to be made against her because those matters can be referred by the claimant to the Tribunal without the witness attending and there would indeed be no point to her attending for cross examination.

26. So far as the third aspect is concerned, refusal of the claimant's request for the attendance of Mr Ishmail Varachia, the Tribunal was not aware of an email that was before the Acting Regional Employment Judge Warren when she suspended the order that Mr Varachia attend, within that email the Tribunal had been aware that Mr Varachia had asserted personal reasons relating to his family and half term, they are set out in detail in the email, what the Tribunal had not been aware of and is now is the following said by Mr Varachia "*I do not believe I have anything of relevance to contribute to the evidence in this case, my employer has allowed me to review its copy of the hearing bundle which contains the claim brought by Mr Laing, I have now had an opportunity to look at this and having done so I am confused as to why Mr Laing thinks I will be able to provide relevant evidence. I had very little interaction with him whilst he was worked at the Citizens Advice Bureau, Bolton, and I would not say that I knew him, I remember maybe two days where he sat near me in the office and I also had a brief discussion with him at a CPD event, I never had any in depth conversations with him, I don't feel I can give any relevant evidence about the allegations he has made of discrimination or about his dismissal, which I had absolutely no involvement with.* "

27. He then says he would be grateful for confirmation as soon as possible as to whether he would be required to attend. The witness order in respect of him was suspended and this Tribunal sees no reason to interfere with that suspension. The Tribunal takes the view it would be unnecessary and disproportionate for Mr Varachia to attend and therefore there will be no change to the position in respect of his suspended witness summons. This deals with all the matters which the claimant has raised on 18th February 2020.

Employment Judge Grundy

6 April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 April 2020

FOR THE TRIBUNAL OFFICE