EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Edward**
Respondents: **Tavistock and Portman NHS Trust**

London Central Remote Hearing (CVP) **On: 9 March 2021**

Before: **Employment Judge Goodman**
Mr D. Clay
Mr M. Simon

JUDGMENT

The tribunal panel does not recuse itself from the remedy hearing.

REASONS

1. This hearing was listed to decide whether the panel should recuse itself from the remedy hearing currently listed for 21 April 2021. Both sides have asked the panel to decide the point on the written material, and neither attended.

2. This hearing was listed as a public hearing, but no members of the public attended to observe and after five minutes we adjourned to private discussion.

3. We heard the evidence in the claims for discrimination harassment and victimisation over seven days in March 2020. The decision was sent to the parties on 7 April 2020. Remedy was listed for hearing on 12 June 2020, but this had to be postponed because of pandemic restrictions; there have been some practical difficulties in finding a date, but it is now listed for 21 April.

4. We understand that the claimant has appealed those parts of our decision which did not go in his favour, but his appeal was rejected by an EAT judge on the sift. We also understand that the respondent has appealed the finding that he was victimised in relation to redeployment. The panel is not seen either notice of appeal.
5. Having been sent the decision on 7 April 2020, the claimant applied on 20 September 2020 for the panel to recuse itself because of bias. His letter is set out in nine pages, well-structured, criticising particular points of the findings and

conclusions. He has also supplied us with 131 pages of documents, including the decision, the application letter, the amended particulars of claim, and extracts from the hearing bundle on the particular points on which his application relies.

6. The respondent wrote to the tribunal on 3 March 2021 that they did not accept that the panel showed bias, and reminding us of the legal test.

7. The legal test of whether there is real or apparent bias on the part of a court or tribunal was set out in Porter v Magill (2002) 2 AC 357. 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".*

8. Bias, both actual and apparent, is important, because not only must justice be done, but it must be seen to be done. The test is that of an objective observer who knows something of discrimination law and tribunal procedure. Would such an observer have concluded that there was a real possibility that the tribunal was biased against the claimant?

9. The claimants application focuses on three areas.

10. The first is about our assessment of evidence given by Frances Endres. She had criticised the claimant for not attending meetings. In the capability process at a later stage, she gave an opinion of him which we concluded was misleading. We concluded that the reason why it looked as if the claimant had not attended many of her meetings was not because he was unreliable, but because she had told him not to attend. The claimant argues in his application that she acknowledged in tribunal she had told him, but our finding was about why she said at the time he was unreliable. The claimant objects that the respondent did not in fact rely on her assessment of attendance, and our finding as to the reason why her opinion was misleading was reached in the absence of submission by either party on this point, and that this demonstrates that we were seeking to exculpate her from allegations of race bias as a reason for her input to the process that led to the termination of his employment.

11. We did not follow altogether the point the claimant seeks to make. We found that Ms Endres was unreliable in her assessment. If the claimant is right, and the respondent did not rely on what she said about his attendance record, it is hard to see how any bias because of his protected characteristic that she exhibited was a reason why they terminated his employment, though he may be saying we looked at irrelevant matters and this shows we were searching for exculpatory material. Moreover, our finding that she had forgotten is not in her favour. To our mind, her conduct demonstrated that she was not a fair manager, or a reliable witness on his behaviour. We considered her conduct in paragraph 111. This is a paragraph to which the claimant takes objection. It is the part of the decision which examines various pieces of evidence to see whether they do or do not indicate that race was the reason for any of respondent's actions. The claimant's objection to our finding that she had "forgotten" why he did not attend meetings is, presumably, that she knew full well why he did not attend meetings and was deliberately misleading her colleagues. She did later concede she had forgotten, but our finding was that when she gave feedback (the relevant time) she had forgotten. Sometimes employers mismanage processes and make wrong decisions. The tribunal has to decide whether it can draw an inference from evidence that the reason for any mismanaged process is race. Paragraph 111 explains why we thought race was unlikely to be the reason for Ms Endres's unreliable report. We

could not understand how this showed bias. The claimant argues that because "forgetting" was not advocated by either side as an explanation, we should not have considered it. The tribunal understands that discrimination cases are particularly fact sensitive, as reason for actions may not be obvious, even to the actors, and that we have to consider all the evidence and reach our own conclusions having heard it. We could not understand how a fairminded and informed observer would conclude that there was a real possibility of bias because we asked ourselves why when asked for an opinion on his performance she had been misleading about his attendance at meetings.

12. The second objection to the decision said to show bias is a comment in paragraph 58 that the claimant's recollection or construction of events was not always reliable, describing an episode when he was asked for a password. All this was in the emails, so we had the contemporary evidence before us. We found the claimant's construction that the other person was seeking to trick him into revealing confidential matter was ludicrous, and on reviewing it at this hearing we cannot read it otherwise. We also believe that an impartial observer would reach the same conclusion, or could readily see how we came to it. It does not indicate a real possibility of bias.

13. The final objection is about our finding on the claimant's assertion that setting grammar as an objective on his performance review showed race was a factor. We stand by the reasoning in paragraph 113. It is legitimate for employers to complain of poor grammar, and doing so does not without more indicate race bias. Of course it could be, especially in a job that did not require written or spoken work, but in this case, we concluded otherwise. We understand the claimant's objection that on review his grammar was found satisfactory, but we could also understand why it had been chosen in the first place. In fact sensitive cases it is necessary for tribunals to consider many facts to assess whether a protected characteristic was the reason for detrimental treatment and this finding was one of many. We did not understand that an impartial observer, who would consider all the many facts in context in this dismissal, would conclude that this finding showed a real possibility of bias.

14. We conclude that it is not necessary for the panel to recuse itself. We very much regret that the claimant considers it highly likely he will not get a fair hearing when we come to assess remedy for victimization, and assure him we will make our assessment having regard to our duty to judge cases without fear or favour, affection or ill-will.

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Employment Judge Goodman

Date: 17/03/2021

JUDGMENT and REASONS SENT to the PARTIES ON

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Case No: 2205825/18

17th March 2021.

FOR THE TRIBUNAL OFFICE