Neutral Citation Number: [2022] EAT 30

Case No: EA-2019-SCO-000022-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 11 February 2022

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

Mr W Finlayson, trading as Finlaysons	**Appellant**
- and –	
Miss A McMahon	**Respondent**

- -
- -

Mr A Ardrey, Advocate (instructed by Finlaysons, Solicitors) for the **Appellant**

Mr E Mowat, Solicitor (AC White, Solicitors) for the **Respondent**

Hearing date: 27 January 2022

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JUDGMENT

SUMMARY

TOPIC NUMBER 8 – Practice and procedure; bias and procedural fairness

TOPIC NUMBER 11 – Unfair dismissal; remedy; compensatory award

The Appellant was found to have dismissed the Claimant unfairly. He appealed on the basis of apparent bias / procedural fairness in the hearing before the Employment Tribunal. He also maintained that the Tribunal had erred in awarding compensation to the Claimant.

Held: refusing the appeal,

(1) Whilst criticisms might be made of certain aspects of the Judge's management of the hearing, there was no basis for a conclusion of apparent bias.

(2) All of the Appellant's criticisms of the Judge's approach to assessment of loss were simply attempts to re-argue fact.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. This is an appeal from a Judgment of an Employment Tribunal at Glasgow (Employment Judge Rory McPherson, sitting alone) dated 19 February 2019. The Tribunal found that the Claimant had been unfairly dismissed by the Respondent (now the Appellant in this appeal) and ordered him to pay the Claimant a basic award of £524 and a compensatory award of £15,506.14.

2. The Notice of Appeal contains twenty-four grounds of appeal, all of which were permitted by Lord Summers to proceed to a full hearing following a Rule 3(10) hearing in April 2021. At the full hearing before me, however, grounds 1 to 8 were not insisted upon and only grounds 9 to 24 were argued.

Amendment of the Grounds of Appeal

3. The Appellant's Skeleton Argument made reference to "amended" grounds of appeal. I was advised by Mr Ardrey that he had tendered such amended grounds at the Rule 3(10) hearing. Following that hearing, an Order was issued dated 30 April 2021 which made no reference to any amendment of the grounds of appeal having been allowed. Neither party was able to explain to me why that was the case, and no reasons were given for the Rule 3(10) decision.

4. Mr Mowat helpfully confirmed that he had prepared for the appeal hearing on the basis of what bore to be the amended grounds of appeal. On that basis, he did not oppose any motion that might be made on behalf of the Appellant of new to amend the grounds. Mr Ardrey indicated that his understanding had been that his amendment had been allowed and he had prepared for the hearing on that basis. He accepted, however, that the Order of 30 April 2021 did not reflect that understanding. In these circumstances he moved me to allow amendment of the grounds. Given the confusion created by the Order of 30 April 2021, I granted that motion.

Facts

5. The Appellant is a sole practitioner solicitor who practises in Kilwinning under the trading name of "Finlaysons". Between 4 August 2015 and 22 November 2017 he employed the Claimant as a typist / receptionist. The Appellant also employed other members of staff including his wife, Joan Finlayson, who worked for him as an office administrator.

6. On 30 October 2017 the Claimant was told by a work colleague that Joan Finlayson had viewed the Claimant's computer and noted that the Claimant had apparently been shopping on the internet during working hours. Mrs Finlayson did not discuss that issue with the Claimant on 30 October. On 31 October, the Claimant commenced a period of sickness absence. She self-certified for 7 days.

7. On Monday 6 November, the Appellant wrote to the Claimant to remind her that her self-certificate had expired and she would need a doctor's certificate in relation to any further period of absence. The Claimant duly produced a Fit Note from her GP which covered the period to 20 November 2017 and stated that the reason for her absence was "stress related to illness / anxiety".

8. On 14 November, the Claimant sent the Appellant another Fit Note from her GP which certified her as unfit to attend work between 16 November and 4 December 2017 due to a "stress related illness"

9. On 16 November the Appellant wrote to the Claimant to invite her to a disciplinary meeting on 21 November. Issues to be discussed at that meeting included, "internet use during working hours", "time keeping", "productivity and quality". The letter also stated that the Appellant did not accept that the Claimant had been absent from work for legitimate reasons. He advised her that if she did not attend the disciplinary meeting it would proceed in her absence.

10. On 18 November, the Claimant wrote to the Appellant in response to the invitation to attend the disciplinary hearing. She indicated to him that she was not fit to attend the hearing. Her letter stated, *inter alia*:

> **"…your persistent harassment has prolonged my illness giving me more stress"**

11. On 22 November, the Appellant wrote to the Claimant in reply to her letter of 18 November. He informed her that the disciplinary hearing had not proceeded. The letter continued:

> **"You have accused me of 'persistent harassment'. This is a serious allegation of criminal conduct which I totally refute, and destroys the employer / employee relationship which requires to exist. I cannot envisage how you can possibly ever come back to work for me now. In these circumstances I now consider that you have committed an act of gross misconduct warranting instant dismissal. You have the right to appeal against this decision and if you wish to do so please let me have your reasons in writing within the next seven days…Your P45 and any sums due to you will be forwarded in due course."**

12. The Claimant's GP issued a further Fit Note which certified her as unfit to work until 18 December 2017.

13. The Claimant intimated that she wished to appeal against the decision summarily to dismiss her. The appeal took place on 7 February 2018. The Appellant was the decision-maker in the appeal. He upheld his own previous decision to dismiss.

The Proceedings in the Employment Tribunal

14. The Claim Form (ET1) was presented on 15 March 2018. In it the Claimant sought compensation for unfair dismissal and notice pay. A Response Form (ET3) resisting both claims was lodged on 12 April 2018.

15. On 18 April 2018, an Employment Judge made a standard case management order under Rule 29 of the Employment Tribunal Rules. The order stated *inter alia*:

> **"No later than 28 days prior to the final hearing, the parties shall provide copies to each other of any documents upon which they intend to rely."**

16. In due course, the case was set down for a two day full hearing on both merits and remedy on 3 and 4 October 2018. That hearing was ultimately discontinuous and took place over six days between October 2018 and January 2019 before fee-paid Employment Judge, Rory McPherson. The Appellant represented himself throughout the hearing. The Claimant was represented by Mr Mowat, solicitor, who also appeared for her in this appeal.

Overview of the Grounds of Appeal (as amended)

Judicial bias – grounds 14-24

17. Several particular matters are said to have arisen during the full hearing before the Employment Judge which are now the subject of allegations by the Appellant of apparent judicial bias. Some are said also to have been procedurally irregular. In summary, and taking the episodes in chronological order, they relate to:

- discussions between the Judge and the Appellant during the Appellant's evidence in chief and during the Respondent's cross examination of the Claimant about the meaning of the expression "persistent harassment" (grounds 14, 16 and 17);

- a discussion between the Judge and the Appellant during cross of the Appellant about his wish to call his trainee, Ms McKay, to give evidence about something alleged to have been said by the Claimant during the appeal hearing in February 2018 (ground 15);

- a discussion between the Judge and the Appellant during cross examination of the Claimant about his wish to put to her a document which had not been lodged as a production, and the manner in which the Judge resolved that issue (ground 18);

- questioning by the Judge of the Claimant during her cross examination about jobs for which she had applied after her dismissal (ground 14);

- a case management order made by the Judge for written closing submissions to be lodged before the Claimant had led all of her evidence (ground 19); and

- a refusal by the Judge to allow the Appellant a further adjournment of the case, after all of the evidence had been led, to produce revised written submissions (ground 20).

18. The Grounds of Appeal also criticise – again on the basis of apparent bias / procedural irregularity:

- the Judge's frequent references in his Reasons to authorities that were not cited by parties in argument (ground 21); and

- the Judge having carried out his own researches into the law on a particular issue (to do with eligibility for Income Support) that was raised by the Appellant during submissions (ground 22).

19. Finally on the issue of bias, the Appellant relies upon the contents of a short video of the Employment Judge which appears on the website of the firm of solicitors in which he works a partner when he is not sitting as a fee-paid Employment Judge. (ground 23).

20. Within grounds 13A and 14A (each added by amendment), the Appellant makes what might appear to be more general allegations of apparent bias. These are not expressed with any degree of

specification. On closer reading, however, they seem simply to be intended to be a summary of the more particular issues raised in the other bias grounds. That was how I understood Mr Ardrey to approach matters in his submissions. Similarly, ground 24 is also a general assertion of the Appellant's right to a fair trial which I understood to be entirely dependent upon there being merit in one or more of the other more specific grounds of appeal.

Remedy

21. Grounds of Appeal 9-13 are critical of the Judge's findings that the Claimant had suffered loss and had taken appropriate steps to mitigate such loss. Included within these Grounds are points relating to what is said to be the Judge's erroneous interpretation of **The Income Support (General) Regulations, 1987** and the **Social Security (Contributions and Benefits) Act, 1982**.

Affidavits

22. Prior to the Rule 3(10) hearing before Lord Summers, HHJ Auerbach had issued an Order dated 12 December 2019 directing the Appellant, in accordance with paragraph 12 of the EAT Practice Direction, to lodge Affidavits giving full details of all matters on which he relied in support of his claims of apparent bias. In response to that Order, the Appellant lodged his own Affidavit dated 31 January 2020 and an Affidavit from Rosa Mhairi McKay dated 30 January 2020. On 22 March 2020, Employment Judge McPherson provided comments on the Affidavits lodged on behalf of the Appellant.

23. On their face, the Affidavits and the comments from the Judge present rather different descriptions of certain of the matters which are said to give rise to apparent bias. This appears not to have been noticed at the Rule 3(10) hearing, and no further order was made to try to resolve any matters of apparent or potential dispute. In particular, no further order was made for Affidavits to be lodged by the Claimant and / or her solicitor.

24. At the hearing before me, however, Mr Mowat accepted that the Affidavits lodged by the Appellant were "broadly" accurate, provided always that they were read with the comments of the Employment Judge which provided a fuller context for the factual matters described. Mr Ardrey accepted that, where there were disputes of fact about the discussion between the Judge and the Appellant about his wish to call Ms McKay to give evidence, he was able to agree that paragraphs 5 to 9 of the Judge's comments were factually accurate, under exception of paragraph 7D of the Judge's comments and the final sentence of paragraph 8.

25. Parties were agreed that I should proceed to hear the appeal on the basis of those concessions.

Submissions for the Appellant

26. Under reference to what he called the "old trope" that justice must not only be done but be seen to be done, Mr Ardrey submitted that the decision of the Employment Tribunal should be set aside. Applying the test for apparent bias described in **Porter v Magill** [2002] AC 357 (per Lord Hope of Craighead at para. 103), a fair minded and informed observer, having considered the relevant facts, would have concluded that there was a real possibility that this Tribunal was biased.

27. Mr Ardrey referred me to a short video clip of the Employment Judge. The video had apparently been made in or about 2015. The Judge was appointed as a fee-paid Judge in 2018. The video was made in his capacity as an employment partner in a firm of solicitors which was noted for acting predominantly for claimants. The video remains readily available online as part of the firm's promotional materials on its website. In the video, the Judge makes comments about his firm acting mainly for people who "have challenges at work where they are being treated badly by their employers". He refers to employment law dealing with "the power relationship between workers and employers" and expresses a preference for acting for employees rather than for "powerful corporations". He describes the issue of Tribunal fees being (at the time when the video was made)

one of the main issues then facing employees who were being "taxed out of their ability to assert their rights", and refers to the fact that his firm does not represent employers: "We're here to represent ordinary people who have difficult disputes with their employers."

28. Mr Ardrey accepted that the video was not, of itself, sufficient to give rise to a perception of bias. His position, however, was that it was relevant context to what happened at the hearing. In combination with the video, the various specific incidents founded upon by the Appellant met the test for apparent bias described in **Porter v Magill**.

29. Turning to those specific incidents, and under reference to the Appellant's Affidavit, Mr Ardrey submitted that a perception of bias arose first from the intervention by the Judge during the Appellant's evidence in chief to challenge the proposition that the expression "persistent harassment" was an allegation of criminal conduct. The Appellant had given evidence to that effect at the Tribunal hearing, and had supported his evidence with Counsel's Opinion from Mr George Gebbie, Advocate. It was not appropriate for the Judge to have questioned that proposition during the Appellant's evidence in chief. In so doing, he had created an impression that he was stepping in to assist the Claimant. A similar point applied to an intervention on this issue made during cross-examination of the Claimant.

30. A second perception of bias had arisen during cross-examination of the Appellant after it was put to the Appellant that the Claimant had "no issue" with Mrs Finlayson. The Appellant had disputed this and had indicated that his trainee solicitor, Ms McKay could give evidence to support his position. The Judge had indicated that he would be likely to refuse any application to lead Ms McKay's evidence, and had questioned the weight which he could attach to it given her status as the Appellant's trainee.

31. A third perception of bias had arisen when the Appellant had tried to put a document to the Claimant in cross which had not been lodged as a production. The Judge had insisted that the document be lodged, and – without being asked to do so – had allowed cross-examination of the Claimant to be interrupted to allow her solicitor to take instructions from her about the document. According to ground of appeal 18, this was prejudicial to the Appellant because it "gave the Claimant an opportunity which she would not and should not otherwise have had to consider her position." In the course of discussion about this issue, the Judge had also been critical of the Appellant for suggesting that the Claimant was seeking "vast" compensation from him.

32. A fourth perception of bias arose during the Appellant's cross-examination of the Claimant about mitigation of loss. He had questioned her about jobs for which she had applied as well as jobs which he suggested were available but for which she had not applied. The Judge had then interrupted the Appellant's cross-examination for an extended period to ask the Claimant about the positions for which she had applied. This suggested that the Judge was taking over the role of the Claimant's solicitor.

33. On the penultimate day of the hearing, the Judge had directed that written submissions should be lodged by both parties before the evidence had been concluded. When the Appellant had sought to resist the making of such a direction, the Judge had threatened him with a wasted costs order. This was a fifth reason for a perception of bias against the Appellant and was also procedurally irregular.

34. On the sixth and final day of evidence, the Claimant's case closed before lunchtime. The Judge had insisted that the parties proceed to supplement their existing written submissions with oral submissions. When the Appellant had sought further time to prepare a revised written submission in advance of a further hearing date, the Judge had again threatened him with a wasted costs order. This was again procedurally irregular and was a sixth reason for a perception of bias against the Appellant.

35. It was clear from the volume of law referred to in his Reasons that the Judge had carried out his own researches. He had referred to cases that were not cited by either party and had independently investigated the scope of Income Support whilst omitting to mention section 124(4)(f) of the **Social Security Contributions and Benefits Act, 1992**. This was procedurally irregular and was a seventh reason for a perception of bias against the Appellant.

36. Issues of bias aside the Judge had, in any event, erred in his approach to loss. He had erred in finding that the Claimant had suffered any loss since she had no intention of returning to work for the Appellant for reasons other than her dismissal. He had erred in finding that she was fit to work and available for employment in the face of evidence that she was in receipt of Income Support. He had erred in rejecting a submission that the Claimant had failed to mitigate her loss.

Submissions for the Respondent

37. Mr Mowat adopted his skeleton argument and invited me to refuse the appeal. The objective test for apparent bias was not met. Each of the episodes founded upon by the Appellant was, in context, legitimate case management. The criticisms of the Judge's approach to compensation were illegitimate attempts to appeal issues of fact.

Analysis and decision

Applicable law

38. In considering the "fair minded and informed observer" test described in **Porter v Magill** it is always necessary for there to be a close focus on precisely what happened at the hearing including all relevant context. These factors are invariably critical (**Locabail (UK) Limited v. Bayfield Properties Limited** [2000] IRLR 96, at para. 25 per Lord Bingham of Cornhill). The fair-minded observer is not complacent but is also not unduly sensitive or suspicious (**Resolution Chemicals Ltd v. H Lundbeck AS** [2014] 1 WLR 1942 at para. 25).

Legal Context

39. The context in which the Employment Tribunal hearing to which this appeal relates arose was a relatively simple claim of unfair dismissal in which the reason for dismissal was conduct. The conduct in question was a single incident. The case was listed for a two day hearing on merits and remedy. That time allocation ought to have been more than sufficient, not least because the summary dismissal of the Claimant was not preceded by any investigation or disciplinary process about which the Tribunal required to hear evidence. The hearing ought to have been straightforward. On the question of liability, what the Tribunal had to do was apply **British Home Stores v Burchell** [1979] ICR 303 to the relevant facts, most of which appear to have been undisputed. The issue of remedy does not appear to have been either difficult or complex.

40. Surprisingly, therefore, the hearing ultimately took a total of six days to complete. This led to the leading of the evidence being spread across more than three months. The Tribunal's Judgment extends to 65 pages and contains 161 paragraphs.

41. The inescapable conclusion is that the Employment Judge struggled – ultimately without success – to limit the scope of the evidence and submissions to matters that were relevant. That is the context against which each of the particular criticisms of bias now made against him falls to be judged by the fair minded and informed observer.

The Judge's Interventions over the meaning of "persistent harassment"

42. On the issue of liability, the question for the Tribunal – applying **Burchell** – was whether, having carried out such investigation as was reasonable, the Appellant (i) genuinely believed that the Claimant had accused him of criminal conduct; (ii) held that belief on reasonable grounds; and (iii) reacted to any such belief, by summarily dismissing her, in a way which fell within the band of reasonable responses.

43. It was not, however, a matter of any dispute that the Appellant had made no inquiry of the Claimant as to what she meant by the expression "persistent harassment" before he summarily dismissed her. It was therefore necessary for the Tribunal to consider whether the Appellant's (*ex-hypothesi* genuine) belief that the only possible interpretation of the expression was an allegation of criminality was a reasonable one which he was entitled to reach without making any inquiry of the Claimant either in a disciplinary investigation and / or at a disciplinary hearing as to what she had meant.

44. The particular context that the fair minded and informed observer would have seen was of the Appellant, as a self-representing party, requiring to rely upon a proposition that was, on the face of matters, surprising: *viz*, that the only possible interpretation of the expression "persistent harassment" in the Claimant's letter was that she was accusing him of the commission of a crime. The fair minded and informed observer would also have seen that the Appellant appeared not to have grasped that the relevant question for the Tribunal was neither an abstract issue of legal construction (as was provided by Mr Gebbie, Advocate), nor one that could ever be fully answered simply by reference to the Appellant's own subjective belief, however genuinely that may have been held. Finally, they would have noted that, as a matter of law, the burden of proof on the issue of reasonableness (per section 98(4) of the **Employment Rights Act, 1996** ("**ERA**") is neutral.

45. In those circumstances, the fair minded and informed observer would have concluded that it was plainly legitimate – and indeed necessary – for the Judge to explore and test the reasonableness of the Appellant's belief on which his position on liability inevitably depended. It was also necessary for the Judge to try, in accordance with the over-riding objective, to confine the hearing to matters of relevance. That he sought to do both of those things was not an indicator of apparent bias. On the contrary, it was entirely legitimate and understandable. This first criticism of the Judge is entirely without merit.

The discussions over the Appellant's wish to call Ms McKay

46. The context of this allegation was not particularly clear either from the grounds of appeal or the Affidavits. So far as I could understand the Appellant's position, it was that during cross-examination of him by the Claimant's solicitor it was put to him that the Claimant had "no issue" with Mrs Finlayson. Why that factual issue should have been relevant was not obvious and was not explained to me.

47. In any event, the Appellant's response to the question was to assert that his evidence (which I infer must have been that the Claimant did have "an issue" or "issues" with Mrs Finlayson) would be supported by his trainee, Ms McKay, who had been present as a witness at the appeal hearing. At that point in cross, the Appellant claims that he indicated a wish to call Ms McKay, apparently to support his evidence on this point.

48. According to the Appellant's Affidavit, the Judge "indicated that he was likely to refuse any application to allow Ms McKay's evidence to be heard" because "she was not only an employee of mine, but a Trainee who relied on me signing her off as fit to be a Solicitor and with me having that hold over her he did not feel that he could give any weight to her evidence". By chance, during this exchange Ms McKay arrived in the hearing room and was asked to wait outside. At some point (the Appellant's Affidavit does not say when), the Claimant's solicitor indicated that he would be opposed to Ms McKay being called as a witness. On the particular allegation of bias said to arise from this episode, the Appellant's Affidavit states:

> **"The disallowing of this evidence was prejudicial to me. It also indicated to me that [the Judge] had formed a view at that early stage about my honesty, whilst also calling my integrity into serious question. This also gave the appearance of bias against me in favour of the Claimant"**

49. The Judge's comments about this incident – which, for these purposes, Mr Ardrey accepted as accurate – present a much fuller and rather different picture of this part of the hearing.

50. The Judge's recollection is that the issue of Ms McKay being called as a witness arose on the afternoon of the second day of evidence (Thursday 4 October 2018) during the Appellant's evidence in chief. There had been no prior notice of any intention to lead Ms McKay. The Claimant's solicitor indicated that he would object to Ms McKay giving evidence. The Judge understood that objection to be based first on the absence of notice that Ms McKay would be called, and secondly on the absence of any need for formal corroboration of the Appellant's account. During this discussion, Ms McKay entered the hearing room. There was some discussion about her status as a trainee, apparently due to concern on the part of the Judge that her "status would be put to her in cross". The hearing was then adjourned for around ten minutes to allow the Appellant to speak to Ms McKay and consider whether or not he wished to call her. At the end of that adjournment, and having apparently spoken to Ms McKay, the Appellant indicated that "she will not be called"

51. Mr Mowat's account of his role in this event – given *ex parte* at the hearing before me – was that his objection to Ms McKay's evidence had simply been on the basis of relevance rather than the other matters referred to by the Judge in his comments.

52. The Appellant states that the Judge disallowed Ms McKay's evidence. On the agreed account given by the Judge, however, that is plainly not correct. The version of this event in the Appellant's Affidavit also fails to mention either the adjournment and interruption of his evidence during which he spoke to Ms McKay or his indication, after that adjournment, that he would not seek to call her.

53. Whilst it was procedurally unusual that a discussion about the Appellant's wish to call Ms McKay should have taken place at all during the evidence of the Appellant (whether in chief or cross) whilst he was still under oath, it is difficult to understand why any comments that the Judge may have

made about the admissibility, relevance, credibility or weight which might be attached to Ms McKay's evidence could reasonably be thought to be an attack on the honesty or integrity of the Appellant. It was also procedurally unusual for the Judge to allow the Appellant, whilst he was still on oath, to interrupt his evidence in order to confer with someone who he might intend to call as a supporting witness. None of this is, however, an indicator of apparent bias. On the contrary, the Judge appears to have departed from what would be considered to be normal practice in a way that was unduly favourable to the Appellant. Rather than allowing the Appellant's evidence to be interrupted, he should have directed that the Appellant conclude his evidence after which any application to lead Ms McKay could then have been made and discussed.

54. On this issue, the fair minded and informed observer would have seen an application to lead Ms McKay being made by the Appellant at an odd time in the case, namely during his own evidence. They would have seen that motion being opposed by the Claimant's solicitor and the Judge then being drawn into a discussion about legal issues of admissibility, relevance and weight. The fair minded and informed observer would have recognised, however, that any views expressed during that discussion could not possibly have been any more than provisional. They would then have seen the Judge allowing the Appellant to interrupt his own evidence to speak to Ms McKay privately before indicating that he would not call her. The fair minded and informed observer would not have concluded that the Judge had disallowed Ms McKay's evidence, nor would they have seen this episode either as an imputation on the character of the Appellant or as an attack on his honesty or integrity. Whilst the procedure which the Judge permitted was odd, it was not an indicator of apparent bias.

The Appellant's wish to cross examine the Claimant about a document not lodged

55. In his comments on this allegation, the Judge notes that the Appellant explained to him that he had not lodged the document which he sought to put to the Claimant in cross-examination because

he "didn't want to forewarn" her about its contents. Again, this is not mentioned in the Affidavits. It is, however, consistent with the Appellant's criticism of the Judge in his Affidavit for allowing the Claimant's solicitor to take the Claimant's instructions on the previously undisclosed production, thereby giving the Claimant "an opportunity…to consider her position." The Appellant incorrectly refers to his attempt to put the document to her as "evidence in replication".

56. The fair minded and informed observer of this incident would have noted that the Appellant had failed to comply with the Tribunal's case management order of 18 April 2018. The document was one upon which the Appellant sought to place reliance but which he had taken a conscious decision not to lodge. He had taken that decision in order to try to take the Claimant by surprise with it during cross. The fair minded and informed observer would have recognised that the Appellant did not appear to understand Tribunal procedures and was seeking to ambush the Claimant with the document in the middle of cross-examination in a manner designed to deprive her of fair notice. In the absence of judicial intervention, the effect of this would have been to prevent her solicitor from taking her instructions on the document *inter alia* before he re-examined her. The fair minded and informed observer would have seen the Judge taking such steps as were necessary and appropriate to restore fairness to the process which would otherwise have been lacking if the Appellant had been allowed to conduct the cross-examination in the way that he sought to do. This criticism of the Judge is completely misconceived.

57. There is also no merit in the criticism of the Judge's intervention when the Appellant used the expression "vast sums of money" to describe the claim for compensation being made against him by the Claimant. The Judge's response was proportionate and appropriate. It was not an indicator of bias.

Questioning of the Claimant by the Judge about mitigation of loss

58. The context of this criticism (which does not appear in the Appellant's Affidavit but features in that of Ms McKay) is that the Appellant cross-examined the Claimant at length about jobs for which she had applied after her dismissal. According to Ms McKay's Affidavit, this took "a great deal of time during the hearing on 16 January [2019]". During this appeal, I was told that the cross-examination had also extended to questions about jobs for which the Claimant had not applied. The purpose of this passage of cross seems to have been to try to discharge the burden of proof that rested on the Appellant of showing that the Claimant had failed to mitigate her losses. Before cross was concluded, the Judge asked the Claimant further questions – apparently also at some length – about the jobs for which the Claimant had applied. Ms McKay's Affidavit suggests that the Judge's questions on this issue "gave the impression of bias as the Judge was taking the role of cross-examination away from Mr Finlayson".

59. The fair minded and informed observer would have recognised that where a suggestion of failure to mitigate has been made, the role of a tribunal is to consider whether or not the steps taken by a claimant to apply for alternative roles were reasonable. The fair minded and informed observer would also have recognised that such an exercise requires to be undertaken having regard to the duty on the part of a tribunal to deal with the issues before it in a proportionate way. Finally, the fair minded and informed observer would have recognised that the role of any Employment Judge at an evidential hearing is not wholly passive. The judge may seek to direct and focus the evidence upon relevant matters, and may be under a duty to do so especially where a self-representing party appears unwilling or unable to do so.

60. Whatever subjective impression Ms McKay may have formed, there is nothing in the materials that I have seen about this issue that comes even close to meeting the **Porter v Magill** test for apparent bias. Neither Ms McKay's Affidavit nor that of the Appellant attempts to identify any respect in which the questioning by the Judge is said to have been irrelevant, nor is it anywhere

suggested that the Judge appeared to be trying to undermine the effect of the previous cross examination. The Appellant fails to explain why the mere fact of questioning by the Judge about matters raised by a self-representing party in cross examination should give rise to an impression of bias.

The Judge's directions about closing submissions

61. Although little explanation of context is provided within the Affidavits, I was told that by the end of the fifth day of evidence the Claimant had given her evidence in chief and had been fully cross-examined. There was insufficient time for the Claimant to be re-examined on that day. The Claimant also wished to lead evidence from her mother, apparently in relation to her mother's inability to offer her paid employment during 2019. A sixth day of evidence was therefore fixed to conclude the Claimant's case.

62. The Judge's direction that written submissions should be provided in advance of that final day of evidence, though unusual, requires to be seen in the context that the remaining evidence in the case was expected to be limited to those matters. It was a direction made in circumstances where the case had already lasted for five days against a time estimate of two days and still required yet more time on a further sixth day. The fair minded and informed observer would have noted that there was scope for the written submissions to be supplemented by oral submissions, and would have seen the Judge's directions as legitimate case management rather than as indicative of bias against one of the parties.

63. Similarly, the direction on the final day of evidence that the written submissions be supplemented by oral submissions was entirely understandable and reasonable. The fair minded and informed observer would have recognised that the relevant issues in the case were not complex and that any matters which had arisen out of the limited evidence heard on the final day could readily be dealt with by both parties in supplementary oral submissions.

64. Whilst the fair minded and informed observer might have seen the threats of costs orders for non-compliance as a little heavy-handed, they would also recognise the need for robust case management given the unfortunate procedural history of the hearing.

65. Apart from his arguments on bias, Mr Ardrey presented these issues also as matters of procedural irregularity. I saw no merit in such arguments. The Judge's approach to directing how submissions were to be presented was unusual but was not procedurally improper. In any event, and as Mr Mowat correctly submitted, the Appellant does not now identify any respect in which he claims he was disadvantaged by being deprived of the chance to make any submission that he wanted to make.

The Judge's reference to authority not cited to him

66. This criticism of bias and / or procedural irregularity is not justified. It is true that the Judge's self-directions on the law are unnecessarily lengthy and ruminative. On occasions, they refer to multiple authorities to vouch the same uncontroversial proposition. There is unnecessary and over-lengthy quotation from authority. A number of legal issues are discussed which have no obvious relevance to the matters that he had to decide. Within that unnecessary material, however, the fair minded and informed observer would also recognise that the Judge did eventually consider and apply section 98(4) **ERA** and **British Home Stores v. Burchell** having self-directed on both at paras 93 and 94. This is concisely seen in the final sentence of para. 117 where the Judge stated:

> **"No employer could have formed a reasonable belief that the statement in the context of the letter and the preceding communications amounted to an allegation of criminality."**

Thereafter the Judge also correctly applied sections 122 and 123 **ERA** to the assessment of the basic and compensatory awards respectively.

67. In relation to his assessment of loss, the particular issue of the Judge's consideration of the rules relating to Income Support was an example of a legal matter that was wholly irrelevant and was accordingly unnecessary for him to address at all. I will return to this point when considering the grounds of appeal which relate to how the Judge dealt with the compensatory award.

Alleged errors of law in relation to remedy

68. Mr Ardrey submitted that, in any event, the Judge erred in law in his approach to the compensatory award. I disagree. Grounds 9 to 11 and 13 are simply attempts to re-argue issues of fact. There was ample evidence of loss arising from the dismissal as well as findings in fact from which the Judge could properly conclude that the Claimant had sought to mitigate her losses (findings in fact at paras. 37 to 49). The Judge's analysis of the issue of mitigation (at paras. 140 and 141) discloses no error of law. There was an express finding in fact that the Claimant was fit for work at all material times following the expiry of her Fit Note on 18 December 2018 (para. 34). I do not understand why these grounds were even allowed to proceed to a full hearing at Rule 3(10) stage. They are completely – and obviously – without merit as they plainly relate to matters of fact rather than law and are not framed as perversity challenges.

69. The alleged significance of the rules in relation to Income Support and their relationship to the section 124(4)(f) of the **Social Security Contributions and Benefits Act, 1992** (ground 12) was a matter raised by the Appellant before the Employment Judge. He argued that since the Claimant did not dispute that she had received Income Support, a factual inference should be drawn that she was unfit to work during the time that she did so. Whilst, therefore, a very cursory examination of this ground might lead to the view that it raises an issue of law it is actually a further attempt to re-argue fact.

70. As I have already noted, at para.34 the Employment Judge made an express finding in fact that:

> **"From 19 December 2017 the claimant has been fit for work at all material times."**

The Appellant does not suggest that the finding at para 34 was perverse, nor could he do so. It was a finding that was plainly open to the Judge. The Claimant's Fit Note expired on 18 December 2017 and there was an abundance of evidence of her then actively seeking work throughout the entire period over which the Tribunal made an award in respect of loss of income.

71. The Judge also made detailed findings about the reasons for the Claimant's receipt of Income Support:

> **"Following the claimant's separation from her partner in around May 2018 the claimant made contact with Job Centre Plus and was advised that as she was a lone parent with a child under 5 she would be eligible to apply for Income Support. The claimant made the application for Income Support…[She] was notified by letter dated 23 June 2018 that she was awarded income support backdated to…7 June 2018 payable on a fortnightly basis."** (para. 47)

72. In these circumstances, textual analysis of the Income Support rules and section 124(4)(f) of the **Social Security Contributions and Benefits Act, 1992** was irrelevant and unnecessary. Given, in particular, the unchallenged findings in fact at para. 47, such analysis had no probative value whatsoever in determining the issue of the Claimant's fitness for work.

Summary and disposal

73. Whilst criticisms can be made of certain aspects of the Judge's management of the hearing, none comes close to forming any basis for a conclusion of apparent bias. On a careful and focussed examination of the hearing as required by **Porter v Magill** and **Locabail**, with or without reference

to the video, the Appellant's allegations of apparent bias, whether considered individually or collectively, have no merit whatsoever.

74. All of the Appellant's criticisms of the Judge's approach to assessment of loss are simply attempts to re-argue fact.

75. For these reasons, the appeal is refused.