Case Number 1309303/2020
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr H Ahmed		**Department for Work & Pensions**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 18 – 21 July 2022

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mr R Virdee**
Mr J Kelly

Representation
For the Claimant: **In Person**
For the Respondent: **Mr C Khan (Counsel)**

JUDGMENT
(Promulgated on 21 July 2022)

The unanimous Judgement of the tribunal is that:

1 This hearing should continue as a hybrid hearing as listed. Participants may join the hearing by CVP. Participants may attend the hearing centre and join the hearing using equipment provided by the tribunal.
2 The claimant's applications for the recusal firstly of Employment Judge Gaskell alone, and later of the entire panel, are refused.
3 Pursuant to Rule 47 of the Employment Tribunals Rules of Procedure 2013, the claimant's claims are dismissed in their entirety.

REASONS
Reasons were given orally on 21 July 2022. These written reasons are provided pursuant to a request received from the claimant in compliance with Rule 62 of the Employment Tribunal Rules of Procedure 2013

Introduction

1 The claimant in this case is Mr Hafeez Ahmed who has been employed by the respondent, the Department for Work and Pensions, as a Work Coach since September 2007. By a claim form presented to the tribunal on 22 September 2020 the claimant brings claims for unlawful discrimination on the grounds of disability and/or race; for a failure to make reasonable adjustments; and for victimisation. As originally presented, the claim involved to respondents: namely,

the current respondent and Mr Jack Feeney – Barrister-at-Law who previously appeared on behalf of the respondent in an earlier employment tribunal claim brought by the claimant (**Case Number 1300215/2018**).

2 There were preliminary hearings for case management hearings before Employment Judge Broughton on 3 June 2021 and 16 February 2022. Judge Broughton listed this final hearing and a list of issues was agreed between the parties. Judge Broughton determined that the final hearing should be conducted face-to-face: but his Order makes clear that the final decision on such matters remains with the panel conducting the hearing. (The understanding and past experience of all three members of this panel is that such matters lie for final determination by the panel conducting the final hearing.) At one of the hearings before Judge Broughton, the claimant withdrew the claim against Mr Feeney. His intention now is to rely on Mr Feeney as a witness.

3 On 6 April 2022, an ADR hearing was conducted by Employment Judge Perry which was unsuccessful. Following that hearing, Judge Perry revisited the question of case management for the final hearing. We do not know whether anything significant had occurred between Judge Broughton's second hearing on 16 February 2022 and Judge Perry's hearing on 6 April 2022, but certainly it appears that Judge Perry approached the case on the understanding that it was to be conducted by video conference. He concluded that special provision needed to be made for the claimant (but only the claimant) because he did not have available a stable broadband connection - he had joined the hearing on 6 April 2022 by telephone rather than by video conference link as had been anticipated. The final paragraph of Judge Perry's Order suggests that the hearing was to be conducted by CVP, but would be converted to a hybrid hearing because of the claimant's intention to attend in person. The relevant paragraph reads as follows:

> *"Finally, I need to record that Mr Ahmed did not join the hearing today by CVP as listed and I instead permitted him to join by telephone. He told me this is because he does not have stable internet connection has to connect in with permission to his neighbour's broadband as he does not have broadband of his own and only has an old laptop. Any hearing will thus need to take place as a minimum as a hybrid as he intends to appear in person."*

4 Judge Perry directed that there should be a final case management hearing listed on 30 June 2022 to ensure that the parties had fully complied with all Case Management Orders and that the case was ready for trial. The hearing on 30 June 2022 was conducted by Regional Employment Judge Findlay. It seems clear that, in a reversal of the position as Judge Perry understood it, Judge Findlay approached the case on an understanding that the hearing was to

be conducted face-to-face. She made Orders directing that one of the respondent's witnesses should give evidence face-to-face, but another could give evidence by video link. Judge Findlay's Order is silent as to the rest of the witnesses or the attendance in person or otherwise of the claimant, the respondent's representative and the panel. No member of this panel understood Judge Findlay's Order as in any way restricting our discretion as to the management and conduct of this hearing. In any event, as stated, Judge Findlay's order was silent as to arrangements other than for two of the respondent's witnesses.

The First Day of the Hearing: Monday 18 July 2022

5 Our first involvement in this case came on the afternoon of Friday 15 July 2022 when each member of this panel received notification that we had been allocated 9-day case commencing on Monday 18 July 2022. We were told it was a hybrid hearing which we were to conduct remotely. Employment Judge Gaskell raised a query as to the hybrid nature of the hearing. In response to this query, the tribunal administration sent him a copy of Judge Perry's Order. At that stage, no member of the panel had seen any other papers. On the basis of Judge Perry's Order, Judge Gaskell was expecting to find that the claimant would attend the hearing centre in person; but that the respondent and its witnesses would attend remotely as would the panel.

6 The panel were therefore surprised to find that all parties and witnesses had (or were intending to) attend the hearing centre in person. It appeared that the only participants who were remote were the panel itself. This became one of two preliminary issues which Judge Gaskell raised with the parties.

7 The first preliminary issue was that, upon starting to read the papers in this case, Judge Gaskell realised that he had previously sat on a panel to determine another case between the same parties (**Case Number 1310355/2020: heard 8 – 10 June 2022**). In that case, judgement had been reserved by the panel: since 10 June 2022, the panel had met and made its decision, but the reserved judgement had not as yet been promulgated. In that case, the claimant had not given oral evidence and accordingly in reaching its decision the panel had not made any findings adverse or otherwise with regard to his credibility. Both parties agreed that the fact of Judge Gaskell having heard the previous case was no bar to his hearing this case and there was no basis for him to recuse himself.

8 The second preliminary issue was the current hybrid arrangements. Judge Gaskell expressed the view that if the panel were attending remotely, there appeared to be no good reason why it was necessary for the parties, their representatives and their witnesses to attend in person. Mr Khan explained that

he was present and was intending for his witnesses to be present because he had understood that the panel would also be present in person. However, if the panel was to attend remotely, then he suggested that the hybrid nature of the hearing was such that it was unnecessary for him or for the respondent's witnesses to attend in person. He would prefer himself and for the witnesses to attend remotely.

9 When asked for his views on the situation, the claimant's initial response was simply to state that the issue had already been determined by the Regional Employment Judge. Until this time, the panel had not seen, and was unaware of, Judge Findlay's Case Management Order. We arranged for a copy of the Order to be provided to us, and considered its contents before hearing further submissions.

10 Having considered Judge Findlay's Order, and having heard further submissions from both parties, we announced our conclusion as follows:

(a) Judge Findlay had not made any determination as to the overall conduct of the final hearing.
(b) In any event, Judge Findlay's Order was not such as to displace the discretion of the panel when conducting the final hearing and determining the appropriate procedure in accordance with the overriding objective and the panel's case management powers including the discretion to use electronic means of communication (Rule 46: Employment Tribunals Rules of Procedure 2013).
(c) Finally, it appeared that Judge Findlay's Order had been made against an assumption that the panel would be present in person. The panel had then been allocated the case on the basis that they would hear it remotely as a hybrid hearing. This was a material change in circumstances which might justify the variation of Judge Findlay's Order even if it was otherwise determinative.

11 When pressed, the claimant explained that it was his preferred choice that all witnesses should attend the hearing in person. He believed that his cross-examination of those witnesses would be more effective if he were face-to-face with them in the room.

12 We considered the claimant's position but could see no compelling reason why his cross examination of witnesses would be more effective face-to-face rather than by video link especially as the panel was conducting the hearing remotely. A hybrid hearing with only the claimant present was clearly what Judge Perry had envisaged. We went on to announce that, in our judgement, it was in the interests of justice, and consistent with the overriding objective, for the hearing to continue as a hybrid hearing. Any party or witness who wished to do

so could joining remotely. But any party or witness who preferred to attend the hearing centre could do so and would be allowed to use electronic equipment provided by the tribunal to enable them to join the hearing.

13 The claimant was dissatisfied with this ruling. At this point, in his arguments became incoherent and inconsistent and his behaviour became aggressive and abusive.

14 The argument was incoherent and inconsistent in that the claimant then asserted that, by our ruling, we were *forcing* him to attend the hearing centre the following day during a forecast heatwave. (At no stage did the claimant request an adjournment of the proceedings because of the heatwave.) The incoherence of this position is firstly, the tribunal was not *forcing* him to attend the hearing centre; to the contrary, we were giving him the option not to attend. Secondly, it was the claimant's position which would have *forced* attendance both of himself and of other participants because of his insistence that the witnesses giving evidence should be present in the room.

15 The claimant was further incoherent and inconsistent because he indicated that he would join the hearing remotely by telephone but could not do so by video link. Accordingly, it was the claimant's position that if he were permitted to join by telephone he could effectively cross-examine the respondent's witnesses even though this would inevitably mean that they were not present in the same room as him.

16 The claimant was abusive and aggressive: he consistently spoke over Judge Gaskell and Mr Khan. He refused to accept any direction from the panel and demonstrated no respect for the authority of the tribunal. The claimant accused Mr Khan of misleading the tribunal and he accused Judge Gaskell of being a racist. Several times during the course of the morning's hearing of 18 July 2022 claimant asked Judge Gaskell to recuse himself.

17 In addition, to the Ruling made with regard to the nature of the hearing (Paragraph 12 above), the panel also made the following case management Rulings:

(a) That it was not permissible in the interests of justice for the claimant either to be cross-examined or to cross-examine the respondent's witnesses by telephone. It was essential for Mr Khan and the panel to see the claimant whilst he was answering questions. And it was essential for the claimant to see respondent's witnesses whilst they were answering his questions.
(b) The recusal applications were refused.

18 At around 12 noon, the public hearing for the day ended. As planned, the panel were to spend the rest of the day reading the papers in the case. Contrary to what has subsequently been asserted by the claimant, when he left the hearing room the tribunal did not engage in any further discussion or exchanges with Mr Khan.

19 Once the panel commenced its reading-in, it became clear that we needed more time than the half-day which was now effectively left to us. Accordingly, at around 1pm we requested the tribunal staff to email the parties advising them that the panel would continue its reading throughout the following day, 19 July 2022 and would commence the evidence at 10am on Wednesday 20 July 2022. We again made clear that the parties could join by CVP or they could attend the hearing centre and join the hearing using tribunal equipment. The effect of the decision to continue reading for a second day was that no-one was required to attend on 19 July 2022 - the day of record high temperatures.

20 At 4.05pm on the afternoon of 18 July 2022, the tribunal received an email from the claimant complaining about Judge Gaskell's conduct of the hearing that morning. Although the complaint was not specifically addressed to the Regional Employment Judge, Judge Gaskell directed that it be referred to her - and no doubt she will respond in due course. Judge Gaskell also directed the tribunal staff to advise the claimant that issues raised in the letter would we discussed at the commencement of the days hearing on Wednesday 20 July 2022.

The Third Day of the Hearing: Wednesday 20 July 2022

21 At 9:31am on 20 July 22 the claimant sent an email to the tribunal office in the following terms:

> "*I have informed the ET numerous times, and it has been recorded in a case management order, that I cannot attend a hearing by CVP.*
>
> *Regarding attending the hearing in person, that is covered in my complaint.*
>
> *Has the REJ directed that my complaint dated 19/07/2022 about the behaviour and conduct of the tribunal panel on Monday is to be dealt with by the panel themselves? If not, who has made that decision?*"

Contrary to what is asserted in that email, the claimant's complaint of the previous day made no reference to attending the hearing in person during that heatwave on Tuesday the claimant provided no explanation for any non-attendance on Wednesday, 20 July 2022.

22 The days hearing commenced at 10am in the claimant's absence. On behalf of the respondent, Mr Khan indicated that he wished to apply for an Order that the claimant's claim be dismissed for non-attendance pursuant to Rule 47. Before proceeding to hear such an application, the panel concluded that Judge Gaskell should attempt to clarify certain matters for the claimant and encourage his attendance.

23 At approximately 10:50am, on Judge Gaskell's direction, tribunal staff emailed the claimant in the following terms:

(a) Confirming that the claimant's complaint had been referred to the Regional Employment Judge would no doubt reply in due course. But there were matters raised in the complaint which we had hoped to address upon continuing the hearing.
(b) Explaining that, whether by judicial complaint or by appeal, neither the Regional Employment Judge nor the Employment Appeal Tribunal had jurisdiction to intervene in the management of the current hearing.
(c) Stating the panel's intention to continue the hearing at 2pm and inviting the claimant to attend by CVP or in person and pointing out that attendance by CVP could be achieved from the claimant's smart phone which he had in his possession the previous day.
(d) Inviting the claimant to state his intentions by no later than 11:30am and informing him that if nothing further was heard from him or if he informed the tribunal that he would not attend, then at 12noon the panel would hear Mr Khan's application to dismiss the claim pursuant to Rule 47.
(e) The claimant was informed that for the purposes of hearing Mr Khan's application and responding to it the claimant was welcome to join the hearing by telephone if he wished.

24 At 11:30am nothing further had been heard from the claimant. And so, at 12noon, the panel heard Mr Khan's application. At 12:21pm, we were alerted to the fact that an email had been received from the claimant. We interrupted Mr Khan's submissions in order to consider its contents. The claimant wrote in these terms:

> *What the EJ Gaskell, Mr Virdee and Mr Kelly are doing to me wouldn't be happening if I was white.*
>
> *I didn't understand one word of what Mr Virdee was saying when he spoke on Monday.*
>
> *The tribunal state "The panel have fully explained why they are unwilling to allow you to continue with the substantive hearing by telephone." This statement is a fallacy. The tribunal overruled EJ Findlays order, and*

presidential guidance, about the respondents witness attending the hearing in person, This is what they have failed to explain. I am applying for a full explanation for this decision in writing.

The respondent is free to apply for a strike out at any time, that is their right under the rules. I am assuming the hearing continued in my absence this morning with only the respondent present when the respondent stated this intention. The tribunal says they are content for me to join the strike out application hearing by telephone, EJ Gaskell must have let out another laugh when this was decided.

Mr Khan's first duty is to the court. Where that duty conflicts with the duty to his client the duty to the court prevails. On Monday he deliberately misled the tribunal in regards to previous case management orders regarding in person witness attendance in order; these case management orders can be understood by a child. This is an abuse of process and vexatious behaviour designed to agitate me. I will make a strike out application in due course.

I will not be able to attend today. I am fatigued due to the effects of my disability, which has been exacerbated by the racially motivated bias of the tribunal, especially during Monday's session and the recent extreme temperatures which have resulted in sleep deprivation. I am experiencing high levels of stress, due to the consequence of my disability and the tribunals and respondents' evil behaviour towards me. I suffer from social anxiety and always need to prepare myself mentally when I attend hearings (and other events) and the tribunal demanding I attend by 2pm today has not given me enough time. I cannot attend by CVP which I have repeated ad nauseam. For all these reasons I cannot attend at 2pm today.

On Monday EJ Gaskell tried to intimidate and threaten me when I challenged his intention to overrule REJ Findlay. He said " Me and you will not get on over the next 9 days."

For the first time the claimant provided an explanation for his failure to attend. This has not been supported by any medical evidence. Significantly, the claimant gave no indication as to his future intentions and whether, for example, he would attend the tribunal the following day. In the circumstances, we felt it appropriate to continue to hear Mr Khan’s submissions.

25 With regard to the final paragraph of the claimant’s email. For the record, we should state that what was said was in the context of the claimant’s consistently speaking over Judge Gaskell and refusing to listen to directions.

What the Judge actually said was "*you and I will get on much better over the next nine days if you will please listen to me and not speak over me*".

26 Mr Khan completed his submissions and the panel went into closed session to consider our decision. At 1:17pm, on the direction of Judge Gaskell, tribunal staff emailed the claimant to advise him of the position and to inform him that the tribunal would give judgement at 2pm the following day - Thursday 21 July 2022. The claimant was specifically invited to attend either in person at the hearing centre; or by CVP; or by telephone. He was asked to confirm his attendance by no later than 4:30pm. Nothing further was heard from the claimant that afternoon.

The Fourth Day of the Hearing: Thursday 21 July 2022

27 Nothing further was heard from the claimant. The claimant did not attend. At 2pm the panel gave its judgement.

The Law

Case Management including the use of Electronic Communications

28 **The Employment Tribunals Rules of Procedure 2013**

Rule 2: Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing.
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues.
(c) avoiding unnecessary formality and seeking flexibility in the proceedings.
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Rule 29: Case Management Orders

The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. [Subject to rule 30A(2) and (3)] the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

Rule 41: General

The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

Rule 46: Hearings by Electronic Communication

A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and[, so far as practicable,] see any witness as seen by the Tribunal.

29 We have also considered the Presidential Guidance. The default position for open track hearings is to be in person. The Guidance does not remove the discretion of an individual judge or panel given in Rule 46. The Guidance makes clear that the mode of hearing in any particular case is a matter of judicial discretion.

Recusal

30 ***Mulegta Guadie Mengiste Addis Trading Share Company -v- Endowment Fund for the Rehabilitation of Tigray Addis Pharmaceutical Factory Place Mesfin Industrial Engineering Plc*** **[2013] EWCA Civ 1003 (CA)**

Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there

appears to be bias, or, as it is put, "apparent bias". Judicial recusal is not then a matter of discretion.

31 ***Porter -v- Magill*** **[2002] AC 3578 (HL)**

The test which a tribunal should consider when an application for recusal is made 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.”

32 ***Locabail (UK) Limited -v- Bayfield Properties Limited*** **[2001] AER 65**.

The guidance, so far as it relates to apparent bias, includes the following: “The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness unreliable, would not by itself found a sustainable objection. In contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on any later occasion; or if on any question at issue in the proceedings the Judge had expressed views, possibly during the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; …”

33 ***Ansar -v- Lloyds TSB Bank Plc*** **[2006] EWCA Civ 1462**

An application was made by a claimant in proceedings in the Employment Tribunal to a Regional Chairman (now called Regional Employment Judge) to direct that a particular Chairman (now Employment Judge) should not be further involved in case management of the case because the claimant had made allegations of bias against the Chairman in previous proceedings. The Regional Chairman declined to do so. A directions hearing was listed before the Chairman concerned. The claimant applied to him to recuse himself. He declined to do so. The claimant appealed. The EAT (Burton J, its then President, presiding) rejected the appeal. The Court of Appeal rejected a further appeal. In so doing it approved the judgment of Burton J. Burton J quoted the following passage from the judgment of Chadwick LJ in ***Dobbs v Theodos Bank NB*** **[2005] EWCA Civ 468**: “It is always tempting for a Judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course, because the Judge will know that the critic is

likely to go away with a sense of grievance if the decision goes against him. .. But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If Judges were to recuse themselves whenever a litigant … criticised them …. we would soon reach the position in which litigants were able to select Judges to hear their cases, simply by criticising all the Judges they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not".

34 ***Otkrite International Investment Limited and Others v George Uromov and Others*** **[2014] EWCA (Civ) 1315**.

A judge who had conducted a civil trial in the Commercial Court was wrong to recuse himself from hearing a subsequent committal application. The fact that one of the parties made serious allegations of actual bias did not make recusal appropriate where, as here, the judge considered that the allegations were entirely groundless. The mere elevation of an allegation from imputed bias to actual bias did not give rise to any difference of legal principle. It was important that judges did not recuse themselves too readily in long and complex cases.

Dismissal Application

35 **The Employment Tribunals Rules of Procedure 2013**

Rule 47: Non-attendance

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

36 ***Roberts -v- Skelmersdale College*** **[2003] EWCA Civ 954 (CA)**

The Court of Appeal provided guidance as to the application of a predecessor to Rule 47, but written in very similar terms.

(a) First, it confers on Employment Tribunals a very wide discretion to deal with cases (which are not uncommon) of when a party fails to attend or to be represented at the time and place which has been fixed.
(b) Secondly, if the absent party is the claimant, the Tribunal may, in its discretion, do one of a number of things: (i) it may adjourn the hearing to a later date; (ii) it may dismiss the application; or (iii) it may dispose of the application in some other way than adjourning it or dismissing it.

(c) Thirdly, the Rule does not impose on Employment Tribunals a duty of their own motion to investigate the case that is before them, nor does it impose a duty on them to be satisfied that, on the merits, the respondent to a case has established a good defence to the claim of the absent applicant. For example, in an unfair dismissal case where, as here, it is common ground that there has been dismissal, the burden of establishing the reason for the dismissal is on the respondent/employer. But the Rule does not require the Employment Tribunal to hear evidence from the respondent in order to determine for itself substantively the reason for the dismissal, or to satisfy itself as to whether, if the dismissal was for a potentially fair reason, it was fair and reasonable to dismiss the applicant/employee for that reason.

(d) The Rule requires that, before exercising its discretion whether to adjourn the matter to a later date, to dismiss the application or to dispose of it in the absence of a party, the Tribunal must first consider a number of matters. Those matters all refer to documents that would be before the Tribunal.

37 ***Smith -v- Greenwich LBC*** **[2011] ICR 277 (EAT)**

The Rule does not require the tribunal to hear the respondent's evidence when a claimant absents himself; it may do so, or it may adjourn the proceedings, or it may simply dismiss the claim, having first considered any information placed before it under [Rule 47]: see *Roberts v Skelmersdale College*

Our Decisions

The Mode of Hearing

38 It is clear that, on Monday 18 July 2022, this panel was allocated a hybrid hearing. When Judge Gaskell sought further information, he was provided with a copy of Judge Perry's Order which clearly indicated that the nature of the hybrid hearing would be that the claimant alone would be attending the hearing centre in person. When we discovered that the respondent was also present in person we raised the issue for discussion. Mr Khan made a reasonable submission that if the panel were attending remotely there seemed to be no proper basis to require the respondent and its witnesses to attend in person. The claimant's response was misleading (albeit perhaps not intentionally), in his insistence that the issue had been determined by the Regional Employment Judge. Upon our perusal of Judge Findlay's Order, we concluded that she had made no such determination.

39 In proceeding as we did, we took account of the overriding objective; of our general case management powers; and specifically of Rule 46. In our

judgement, as the case had been established as a hybrid hearing there was no compelling need for the parties to be in attendance at the hearing centre. Our Ruling covered all participants equally: the claimant; Mr Khan, and the witnesses.

40 The claimant indicated that he could not attend by CVP. This being the case, we gave him the option of attending in person and making use of the tribunal equipment (exactly as judge Perry had envisaged). We ruled against the claimant attending by telephone: because this was listed as a nine-day hearing where it was anticipated that the claimant would be cross-examined for 1½ days. And thereafter, he would cross-examine 12 witnesses to be called by the respondent. Our judgement is that it would not be consistent with the overriding objective nor in the interests of justice as required by Rule 46 to enable such prolonged exchanges to take place where one party (the claimant) who was either under cross-examination or was conducting a cross-examination was invisible to the other party, the witnesses, and the panel.

41 By our Ruling, the claimant was put in no different position than what he had expected following the hearing before Judge Findlay. His understanding was that all parties including him needed to attend. Our Ruling left him in a position of having to attend (if he could not join by CVP). The claimant provided us with no satisfactory explanation as to why he felt he would be disadvantaged cross-examining a witness via CVP - when he appeared willing to do so by telephone.

Recusal

42 When Judge Gaskell's involvement in the earlier case was pointed out to the parties, neither party sought recusal on that basis. And, in our judgement, applying the relevant case law, recusal would not have been appropriate.

43 The claimant has only sought recusal when case management decisions were made which were not to his liking. Each member of this panel is satisfied that we are not biased nor have we given the appearance of bias. No independent observer, fully informed as to the facts, would reach such a conclusion. It is clearly not acceptable for the claimant to seek a change of panel because he is unhappy about certain preliminary Rulings which have been made. Needless to say, Judge Gaskell and each member of the panel reject the claimant's accusations of racism which are made without foundation.

44 Accordingly, the recusal applications made firstly in respect of Judge Gaskell, and then in respect of the entire panel are refused.

Dismissal Application

45 The panel spent the afternoon of 18 July 2022 and the whole of 19 July 2022 reading into this case. We have therefore read the claim form and the particulars of claim; the response and amendments thereto; all of the witness statements; the Case Management Orders of Judge Broughton, Judge Perry, and Judge Findlay; and the claimant's written submissions which were submitted to the tribunal on 5 July 2022.

46 The claimant has absented himself from the tribunal on two consecutive days (20 & 21 July 2022) without satisfactory explanation. It was not until 12:21pm on Wednesday 20 July 2022 as he offered the explanation that he was feeling fatigued. There has been no supporting medical evidence and even when given the opportunity to deal with discrete parts of the hearing by telephone claimant has still failed to attend.

47 In his communications with the tribunal, the claimant has not applied for an adjournment; nor has he given any indication as to when he expects to be willing/able to resume this hearing which has been allocated nine days of tribunal time. We are now on day four and the cost to the respondent is significant.

48 On this basis we do not consider it appropriate to adjourn the case to a future date.

49 We agree with the submissions made by Mr Khan that there is nothing to be gained by continuing with the hearing in the claimant's absence. The position is that each element of the claimant's claims depend upon the claimant establishing facts from which the tribunal could properly determine that discrimination has occurred. The claimant can only establish that such facts by his own oral evidence and by his cross-examination of the respondent's witnesses. If the claimant is absent, then clearly he will not give evidence nor will he cross-examine the witnesses whose witness statements would then stand unchallenged. In the circumstances, the claimant could not possibly establish his case which would inevitably be dismissed.

50 In the circumstances, we conclude that the appropriate option for us, applying Rule 47, is that the claims should be dismissed in their entirety.

Employment Judge
6 September 2022