Case No: 2413573-18

EMPLOYMENT TRIBUNALS

Claimant: Mr P D Cooper

Respondent: Your Housing Group Limited

Heard at: Liverpool **On:** **23 January 2023**
On paper in chambers

Before: **Employment Judge Aspinall**

Representation
Claimant: no written submissions received
Respondent: written submissions 12 January 2023

RESERVED JUDGMENT

The claimant's application that EJ Aspinall recuse herself from further decision making in this case is denied for the reasons set out below.

REASONS

History of the proceedings

1. By a Claim Form dated 20 July 2018 the claimant brought his complaints of age and disability discrimination. He is a solicitor who had applied for a job as a court officer with the respondent. He was not appointed and says that the respondent discriminated against him because he was 54 years old and had a disability. The respondent defended the complaints saying that the claimant was not appointed as he was not the best candidate.

2. There were two case management hearings; one before EJ Horne and the second before EJ Shotter, before the case came to final hearing on 12 and 13 November 2020. The claimant was represented at final hearing. He attended and participate in the hearing throughout the two days without any need for adjustment.

3. The panel which comprised EJ Aspinall, Mr A Murphy and Mr R Cunningham reached a unanimous decision. Oral judgment was delivered on 13 November 2020. The claimant's complaints failed. The respondent made an application for its

costs. The hearing was converted to a private hearing for case management and orders were made to prepare for a costs hearing.

4. On 13 January 2021 the claimant made an application for reconsideration. Written Reasons were provided on 5 March 2021 and the application for reconsideration was rejected by a decision dated 12 April 2021.

5. Costs hearings were listed for 4 May 2021, 27 October 2021, 5 November 2021 and on each occasion postponed. The claimant said, among other things, that EJ Aspinall was biased against him. He seemed to be arguing that the evidence of bias was that (i) EJ Aspinall was listing costs applications in person (and alternately by CVP) when the claimant said he had produced medical evidence to show he could not attend an in person hearing and had no internet access and (ii) that EJ Aspinall had not understood an element of his case that related to a 30 mile rule the respondent had in place for reimbursing travel expense, he said EJ Shotter had understood it at case management stage but EJ Aspinall had not.

6. The claimant appealed the Judgment dated 13 November 2020 and the decision to decline reconsideration dated 12 April 2021. The claimant included within one of his submissions to the EAT a reference to EJ Aspinall being biased against him. For that reason EJ Aspinall held off addressing any bias or recusal issue until after the decisions of the EAT. His appeals, and requests for extensions of time for appeals submitted late, were unsuccessful.

The recusal application

7. On 7 October 2021 the claimant made an application for EJ Aspinall to recuse herself. He said

I write further to the Court's letter dated 30 July 2021 listing an in person hearing on 5 November 2021. This is further evidence of not only bias but I now consider more serious, as Judge Aspinall had me provide medical evidence as to why I cant attend due to serious physical and mental health issues. I respond 5 July 2022 state it may as well be on paper hearing as she requested to then list it in person knowing I can't attend. Judge Aspinall goes on to state little weight will be given to evidence sent only. If this does not show bias and beyond I don't know what does. This shows further evidence that I will not get a fair hearing on costs over and above the one sided trial where my representative was prevented from presenting my case. I must ask Judge Aspinall to recuse herself from this matter forthwith due to bias as set out already.

8. Following the decisions of the EAT, EJ Aspinall listed the recusal application to be heard on 26 January 2023 and proposed that it be dealt with on paper in chambers. The parties were given opportunity to make representations about the format of the determination and to make written submissions on the application itself. EJ Aspinall's letter to the parties dated 26 October 2022 made the following orders:

"EJ Aspinall has listed the claimant's recusal application as an In Chambers on paper decision at the earliest available date which is 26 January 2023. They judge considers it in the interests of justice to determine the application at the earliest available date, on paper in accordance with the overriding objective of dealing with matters justly and fairly with regard to cost and delay. The respondent has indicated its consent to an in Chambers decision on recusal.

CMO1 The claimant has 7 days from the date on which this letter is sent to the parties to set out in writing (legibly please) either his consent to the recusal application being determined on paper or to set out why he says the recusal application should be dealt with at a hearing in person, or how else he says the recusal application should be determined, and to copy his response to the respondent.

The Tribunal notes that the recusal application relates solely to the employment judge and not the non-legal members.

The claimant has previously raised recusal issues in a number of handwritten (barely legible) correspondences with the tribunal and the EAT.

CMO2 He must now collate his arguments on recusal into one definitive, legible document his Grounds for Recusal, and send it to the Tribunal and respondent by 16 December 2022. The respondent may make any submissions it wishes to make in response to the Grounds for Recusal to the tribunal and the claimant by no later than 12 January 2023. If either party wishes to rely on any authority, a full reference to that authority must be cited in the submission. A party need not send a hard copy of an authority.

The claimant has previously raised health issues as a reason why he cannot participate in a hearing. The claimant has stated "I could not attend court or even in anyway take part in a hearing" (letter dated 8 July 2022 received 14 July 2022). The tribunal has requested that he provide medical evidence of his condition and fitness to participate in hearings; to include in person hearings, hybrid or remote hearings by video or telephone and paper based hearings. He has been invited to make requests for adjustments but has not done so. The Tribunal has received a letter dated 5 May 2021 addressed to "whom it may concern" from Dr Ian Collyer at Broken Cross Surgery setting out the conditions the claimant was experiencing in May 2021 and the treatments in place or awaited for them at that time.

The letter does not state that it was prepared for the purposes of fitness to participate in this case and it does not say he cannot attend hearings and it does not set out any request for adjustments.

CMO3 The claimant has 7 days from the date this letter is sent to the parties to say what conditions are currently affecting him and to say what adjustments if any he will need to be able to participate in the recusal application process.

He may wish to submit a more up to date letter from his GP in support of his requests (if any) for adjustment and is of course, in addition, to the order for the provision of information at CMO3 above invited to request adjustment at any time as he needs it.

Following the determination of the recusal application either EJ Aspinall or another judge will need to list this matter for a costs hearing.

CMO4 Parties must send their non-available dates to attend a costs hearing between March and September 2023 to the Tribunal by 12 January 2023. A failure to respond with dates will result in an assumption that the party is available.

The Sources of Advice leaflet is again attached for the claimant.

9. The respondent made its written submissions in a 10 page document dated 12 January 2023 which set out the chronology of the case and referred to relevant law on recusal.

10. The Tribunal has not received any correspondence from the claimant in response to the 26 October 2022 letter. The letter was sent to the postal address provided to the Tribunal by the claimant.

Whether or not to proceed without submission from the claimant

11. First, I consider whether or not I can make a fair determination today in the absence of submissions from the claimant.

12. On 10 June 2022 the Tribunal wrote to the parties inviting them to provide non available dates for a costs hearing, make representations as to whether a recusal application might be dealt with in person or on paper and inviting the claimant to provide medical evidence of his alleged inability to attend hearings. He was referred to previous correspondences in which he had been invited to set out any adjustments he may need to participate in a hearing. The claimant in a response dated 8 July but received on 15 July 2022 said;

Further to your letter of 10 June 2022, recently received and contents noted. In regards to in-person or on paper, I see little point in responding as last time Aspinall did the opposite. There is medical evidence already before the court and so given {word illegible} disorder, complex mental health issues and spinal problems my condition is not going to change. I will never work again, rent and have no assets. I have already stated I could not attend court or even in any way take part in a hearing in the matter. I also not Judge Aspinall references the costs hearing. This I assume is because she already knows the outcome of my appeal"

13. The claimant was given opportunities on which to object to the format of the hearing as an on paper in chambers determination and has chosen not to do so.

14. As at the date of this recusal decision no further correspondence has been received from the claimant on the recusal point. He has not complied with the case management order to collate his arguments into one definitive legal document. He has been copied in to the respondent's submissions.

15. Having regard to the overriding objective I take into account the following: the claimant was given opportunity to make written submissions and has chosen not to do so, he has alleged bias in his correspondences, he has had sight of the respondent's submissions and chosen not to write in response to them. If I were to postpone and offer him a further opportunity to make submissions that would put the respondent to further cost and delay and may not result in submissions from the claimant in any event. I consider it would not be in the interests of justice to adjourn today. I will proceed to a determination.

16. The Equal Treatment Bench Book provides guidance for judges in the support they may offer to litigants in person. On 19 November 2020 the claimant's representative Mr Raftree informed the Tribunal that he no longer represented the claimant. I consider the claimant is a litigant in person. I will support him in his application for recusal by reading back through his correspondences and listing the grounds on which he has alleged bias.

Relevant Law on Recusal

17. The test for apparent bias is derived from Lord Goff of Chieveley in *R v Gough* [1993] AC 646 at 670. In *Porter v Magill* [2002] AC 357 Lord Hope of Craighead set out the test

"The question 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."

18. The fair minded and informed observer is not the claimant, but someone who is aware of the issues in the case and the relevant factors in recusal.

19. The Court of Appeal in *Locabail* v *Bayfield [2000] QB 451* gave the following guidance "We cannot, however, conceive of circumstances in which an objection could be soundly based on ….the judge's social or educational or service or employment background or history."

20. Harvey on Industrial Relations at Division P Practice and Procedure sets out the following commentary:

> if an objection of bias is made, it will be the duty of the employment judge 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 acceding 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: *Re JRL ex parte CJL (1986) 161 CLR 342 at 352*, per Mason J, High Court of Australia recited in *Locabail* at paragraph 22.
>
> 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 adjournment (or stay) cannot.
>
> There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, 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: Peter Gibson J in *Peter Simper & Co Ltd v Cooke [1986] IRLR 19 EAT at paragraph 17*.
>
> In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal:

Applying the Law
Identifying and labelling the grounds for recusal

21. I worked through the claimant's handwritten letters to the tribunal and have itemised those that contain content that could be relevant to recusal.

Date	C's assertion	The label for this point in the recusal application
21 November 2020	intention to appeal given the background leading to the decision	**No fair hearing – generic**
13 January 2021	Judge Shotter's Order of 25 February 2022 clearly contrasts with that of Judge Aspinall	**The 30 mile rule point**
18 March 2021	Numerous judges had seen the papers and considered it worthy without suggestion of a deposit costs order. Judge Shotter is a judge of a great deal of experience of some 10 years was fully aware of the importance of the 30 mile rule…this all goes to prove no other judge thought it to be a weak case so one can only summise that Judge Aspinall went against those judges when she has only been a judge for a shorter period..this and the following is indicative of a bias approach…she did not grasp the importance of the 30 mile rule..so much so that Mr Raftree was told to move on by the judge as not important, "poor Mrs Ingram" shows bias Called the respondent's solicitor by his first name which case law suggests is too friendly …further evidence of bias As regards to the law Judge Aspinall has it wrong Judge Aspinall stopped questions to Ms Ingram about 30 mile rule…shows Judge Aspinall not understanding or bias	**No previous deposit order** **Other judges' views of the case** **Judge Aspinall less experienced than Judge Shotter** **The 30 mile rule point** **No fair hearing – telling Mr Raftree to move on** **Poor Mrs Ingram** **Mr Brendan McAleese** **Error of law** **No fair hearing – telling Mr Raftree to move on**
9 April 2021	I find the actions of the Court in continuing (to list a costs hearing) a level of bias and unreasonable actions unacceptable (listing CVP hearing) Can't do video Numerically dyslexic I have not been privy to timetables unlike the respondent ….called the respondent's solicitor by his first name	**Listing decisions – CVP hearing on costs** **Correspondence not received** **Mr Brendan McAleese**
23 April 2021	Grave concerns about the fairness of this matter…respondent receives Orders and knows about the time scales…I presume ongoing bias. There appears to be a hearing on 4 May 2021	**Correspondence not received**
25 May 2021	Turning to the outrageous request by Judge Aspinall to prove my numeric dyslexia how dare she, I first have to prove I have a physical	**Invitation to submit medical evidence / request adjustment**

	disability ….I am not required to prove my mental condition	
5 July 2021	Suggestions to enable the costs hearing to take place clearly indicates Judge Aspinall's continued bias approach to me I failed to receive a fair hearing in November due to clear bias Representative not allowed to present my case as such a breach of natural justice This judge's intention to pursue costs regardless / no deposit costs order / Judge Shotter got the point of the 30 mile rule Judge Aspinall did not for reasons best known to herself	**Listing costs hearing** **Fair hearing November 2020 – generic** **No fair hearing- telling Mr Raftree to move on** **Listing costs hearing** **30 mile rule point**
"	Apparent bias Judge Aspinall referred to respondent solicitor by his first name suggesting prior dealings and a cosy relationship Judge Aspinall said poor Mrs Ingram Judge Aspinall couldn't grasp the 30 mile rule – in essence they broke their own riles to employ a candidate who lives 70 miles away while I lived approx. 7 miles away - Judge Shotter states *adverse inferences can be drawn from that* Judge Aspinall stopped representative from questioning Mrs Ingram on that as not relevant Judge Aspinall readily agreed to a costs hearing with no prior suggestion case weak, no deposit order No previous judge found the case to be weak Judge Aspinall applied the law wrong on burden of proof it switched to the respondent	**Mr Brendan McAleese** **Mrs Ingram** **30 mile rule point** **Other judges' views of the case** **No fair hearing – telling Mr Raftree to move on** **Listing** **Other judges' views of the case** **Error of law**
7 October 2021	Listing an in person hearing…is further evidence of not only bias but I now consider it more serious as Aspinall had me provide medical evidence Judge Aspinall (in letter 30 July 2021) states little weight will be given to evidence sent only – if this does not show bias and beyond I do not know what does … I will not get a fair hearing on costs / I had a one sided trial / ask Judge Aspinall to recuse herself forthwith due to bias	**listing** **Invitation to submit medical evidence / request adjustment** **Listing and format**
8 July 2022	I note Judge Aspinall references the cost hearing, this I assume is because she already knows the outcome ..	**Listing**

Addressing the grounds for recusal

I have gathered the points from the final column in the table together and deal with them by theme.

No fair hearing – generic assertion

22. The claimant was represented at the final hearing and no issue of bias was raised at the time. The decision was a unanimous decision of a panel of three equal decision makers yet the recusal application is made only against the Employment Judge. The appropriate arena in which the claimant could have raised concerns about the fairness of his hearing was in his appeal to the Employment Appeal Tribunal. No ground for recusal is made out on this generic assertion.

23. A fair-minded and informed observer, having considered the facts, would notice that the issues on recusal are raised *after* the claimant's complaints failed and after the matter is listed for a costs hearing. No fair-minded, informed observer would conclude that there was a real possibility that the tribunal is biased in the costs hearing going forward. The observer would conclude, on this assertion of having been denied a fair hearing, that the claimant had not agreed with the outcome of the case and does not want to have to face a costs application. That is not a ground for recusal.

30 Mile rule

24. The fair-minded and informed observer would have heard argument in the case and known that the case was about selection for a post. The claimant was not the successful candidate. The Tribunal found that the candidates' addresses, their proximity or otherwise to the place of work, was not a selection criteria. It was relevant only to whether or not, if appointed, expenses might be claimed. The claimant made submissions on the point, by his representative, at final hearing. The point was part of his submission for reconsideration, which was rejected. He raised it in his Appeal to the Employment Appeal Tribunal which was rejected. The point has been considered in full by the final hearing and explained in Written Reasons. I set out the relevant extract from the Reasons here;

"*114. The submission was that Ms Ingram by making enquiries about mileage claims for the successful candidate by email on 5 April to Karen Dyke was therefore campaigning for him or championing him, and that this amounted to evidence of a discriminatory motive in relation to the claimant. The Tribunal finds this argument wholly unsubstantiated. The email exchange relates to the application of the respondent's policies on mileage claims to and from work for its employees. It is part of an internal post decision but pre written offer discussion about contract terms and the application of a policy on mileage expenses. The discussion is not part of the scoring process. The content and tone of the email exchange did not reveal any "championing" by Ms Ingram*

115. the claimant submitted that as he lived within the 30 mile radius allowed for expenses he would have made a better candidate for the role than the successful candidate who lived further away, possibly outside the allowed expenses range. The submission misses the point. Giving an example of why the claimant might have been an attractive candidate, (outwith the selection criteria) even more attractive than the successful candidate, because of a spurious potential saving to the respondent on mileage claims, does not establish a discriminatory motive."

25. The informed and fair-minded observer, knowing the submissions made at final hearing and the Tribunal's reasons for rejecting them would not perceive that the outcome on the 30 mile rule point revealed any apparent bias. The observer would conclude that the claimant did not like the decision of the Tribunal and having tried a second bite of the cherry on this point at reconsideration and having been denied reconsideration on the basis that the point had been considered at final hearing, and having tried to lodge an Appeal and failed, was now trying to reframe it as recusal ground so as to overturn the Tribunal's decision. I reject any argument that I should recuse myself based on the 30 mile rule point.

26. The claimant argues that EJ Shotter had understood the 30 mile rule point and that I had not and that is ground for recusal. EJ Shotter conducted the second case management hearing. She made no determination on the merits of the claimant's case. She recorded at paragraph 3.3 of her summary that the respondent, as part of disclosure and inspection would look for documents relevant to the 30 mile limit and if they did not exist the respondent would cover in a witness statement whether or not there existed a job requirement that the successful candidate should live within 30 miles of the respondent. EJ Shotter recorded what the claimant said which was that the claimant lived 5 miles away and the successful candidate 75 miles away and she notes that she told him that *adverse inferences could be drawn from that* at final hearing. At 3.4 of her summary, following discussion, she recorded that the claimant did not need to amend his witness statement to include any reference to the 30-mile limit. She went on to say *any issues concerning the 30 mile limit may be relevant to cross examination and the burden of proof.*

27. A fair minded informed observer would conclude that EJ Shotter was setting out the parties respective positions and preparing the case for final hearing. She had heard no evidence and reached no conclusion. Comparing EJ Shotter's comments in the case management summary with the outcome at final hearing so as to suggest that EJ Aspinall and, by implication as it was a unanimous decision, Mr Murphy and Mr Cunningham had not understood is disingenuous of the claimant. It is not that I or the non legal members did not understand, we understood but the claimant did not agree with our determination. No fair-minded informed observer would consider that a Judge should recuse herself because a party did not get the outcome he wanted.

<u>No previous deposit</u>

28. There had been no deposit ordered and the claimant asserts this as evidence that I had not understood the case but that judges before me, EJ Horne and EJ Shotter presumably as they had case managed the case had understood it and formed a view on it different to the outcome at final hearing. The fact that the claimant says no previous judge thought his case was weak is misfounded. No previous judge had formed a view. It is a disingenuous argument, again, to seek to overturn an outcome he disagreed with. No fair minded, informed observer would conclude that was evidence of apparent bias. A fair-minded, informed observer would see that no previous judge had determined the issues. He would have regard to the fact that at full final hearing, that the claimant was represented, gave evidence, cross-examined the respondent's witnesses and made submissions. The Tribunal was best placed to reach a determination as it had heard the case. The absence of a deposit order is not evidence of my apparent bias, not grounds for my recusal.

Other judges' views

29. As above, no previous judge had reached a decision on the merits of the case.

Less experienced than Judge Shotter

30. Applying Locabail, above, the service, employment background and experience of a judge, whether on its own or by way of comparison with another judge is not grounds for recusal. In this case the claimant also disregards the expertise and equal decision making authority of the non-legal members. My shorter length of service than EJ Shotter is not grounds for my recusal.

Telling Mr Raftree to move on

31. This was a matter arising out of the final hearing. Complaints about the process or outcome at final hearing are properly subject to appeal. The claimant missed his chance to appeal by lodging his appeal late. In any event, No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in *Peter Simper & Co Ltd v Cooke [1986] IRLR 19 EAT at paragraph 17*. If I did ask Mr Raftree to move on during the final hearing on a point which the Tribunal felt it had heard what it needed, then that is not grounds for my recusal now. The fair-minded, informed observer would see that as part of the usual ebb and flow of a final hearing, the tribunal's power to regulate its own procedure, and not evidence of apparent bias.

Poor Ms Ingram

32. The claimant alleges that by using this phrase I showed bias against him and in favour of the respondent's witness. I have no distinct recollection of using the phrase but it is likely, that if used, it was used in oral judgment to express empathy with both sides who had had the serious business of discrimination allegations hanging over them for a long time. Applying Locabail, this does not amount to evidence of apparent bias. The fair-minded, informed observer would note that the panel had considered the evidence of each of the witnesses and had regard to the documents and submissions before giving oral judgment.

Mr Brendan McAleese

33. The claimant alleges that I used the name Brendan, rather than Mr McAleese and that this showed bias in a "cosy relationship" between me and Mr McAleese that meant I could not be independent and impartial in decision making. The fair minded informed observer would have had regard to the context of the whole hearing. I made no disclosure in the case, because I do not know Mr McAleese outside of his appearance at Tribunal. No informed observer would conclude that the use of a name, of itself, amounted to evidence of apparent bias. If it occurred, it was most likely a slip of the tongue, it was not protested about at the time and it is not, now, evidence of apparent bias amounting to grounds for recusal.

Error of law

34. The claimant says that I got the law on burden of proof wrong. Our unanimous decision was that the claimant had not met the first stage test of section 136 Equality Act 2010. If the claimant had an argument in error of law the appropriate forum for that to be tested was the Employment Appeal Tribunal. It is not a ground for recusal.

Correspondence not received

35. It is plausible that the claimant did not receive correspondence at the same time as the respondent. I have looked into this and can see that the letter of 15 April 2021 from the Tribunal informing the parties about the outcome of the reconsideration was sent to the respondent by email and the claimant (who does not use the internet) by post. It crossed with his own correspondences of 6, 9 and 13 April to the Tribunal. I can see that not receiving correspondence and finding out about an outcome from the other side might be a cause for concern for the claimant. However, a fair-minded informed observer would conclude that this was most likely a natural consequence of choosing to receive post in hard copy as opposed to email and not evidence of a judge being biased. The observer would know that the claimant had requested hard copy correspondence only.

Listing decision making

36. The claimant asserts that I am biased because I have listed costs hearings on a number of occasions (each of them subsequently postponed) and that I have listed costs hearings despite his requests for reconsideration and appeal and his protestations that he cannot attend or participate in any form of hearing at all. I refer the parties to the overriding objective. The Tribunal and the parties are charged with acting in accordance with the objective in dealing with the case fairly and justly. At Rule 2(d) the Tribunal must so far as practicable avoid delay so far as is compatible with proper consideration of the issues. Following the final hearing the respondent indicated its intention to make an application for costs. A private hearing for case management was convened, the claimant was represented. Case management orders were made by consent, by his representative on his behalf, to prepare for a costs hearing. If the claimant had succeeded, a remedy hearing would have been listed. The fair-minded informed observer would not conclude that listing a next step in case meant that there was a real possibility that the judge could not give the parties a fair hearing.

37. The claimant has suggested that listing a video hearing and or an in person hearing is evidence of bias. The format of a hearing is a matter of judicial discretion. Parties are consulted. The claimant has been asked on numerous occasions to provide medical evidence as to the nature of his conditions and his stated inability to participate in a hearing at all. He says he has physical and mental health conditions. He has sent one letter from his GP but it does not say what the claimant thinks it says. It does not say he cannot attend a hearing, either in person or on CVP. He has been invited, on numerous occasions, to write to set out what conditions he has and say what adjustments he may need. He has not done so. The Tribunal regularly affords access to CVP hearings to litigants who do not have internet access. It regularly supports litigants with disability or other access issues to participate fully in their hearings whether by way of provision of aids; such as specialist chairs or tables or document stands and in the provision of adjustments such as changes to sitting times, break times, or changes in the way a hearing is conducted, for example by setting out questions in advance or providing information in different formats. In this case the claimant has been invited, given that he says he has numeric dyslexia / dyscalculia, to request adjustments in the form of verbal schedules of loss in the costs application. He has not done so.

38. The fair-minded, informed observer would not consider this evidence of bias but rather of the application of Rule 2. It is a question of balance. The respondent is entitled to pursue its costs. The claimant has not responded to the invitations to provide medical evidence and seek adjustment that have been offered to him. The fair-minded, informed observer might conclude in the light of the timing of the

claimant's assertions that he cannot attend a hearing at all, in any way, and his previous engagement in the full two day final hearing without adjustments, and his numerous written submissions (some of which are listed in the table above) including a written response to the costs schedule, written statement in response to the costs application, written requests for reconsideration, written appeal and request for recusal, that he can engage in writing but has chosen not to do so. I reject the submission, which I have formulated for the claimant from his correspondences, that in continuing to list this matter a fair minded, informed observer would consider me biased against him. The observer would note that when he raised bias in his appeal, I held off determining a recusal application until after the EAT had reached a decision. The observer would also be aware that costs hearings listed for 4 May 2021, 27 October 2021 and 5 November 2021 were all postponed in response to requests from the claimant. I reject the suggestion that a fair minded, informed observer would consider listing or postponing hearings is evidence of apparent bias in this case.

Invitation to submit medical evidence / request adjustment

39. The claimant has suggested that in inviting him to adduce medical evidence of the conditions he relies on and request adjustments I am biased against him. I refer the parties to Rule 2, to the Equal Treatment Bench Book and to the Equality Act 2010. The claimant sent one letter from his GP which does not say what he thinks it says. A fair-minded, informed observer would see the chronology in this case and the numerous invitations to provide information and request adjustments as appropriate support for a disabled litigant in person and an appropriate application of Rule 2 and the Equal Treatment Bench Book and the tribunal's legitimate concern with ensuring access to a fair hearing for both parties.

40. The claimant alleges that a statement contained in a letter from the Tribunal dated 30 July 2021 is evidence of apparent bias. The letter says that the claimant, who had written to say he would not attend and could not respond to a costs schedule as he has numeric dyslexia, may wish to submit a witness statement as to his means and ability to pay, with attachments to substantiate his financial position as appropriate. It goes on to say *though if he does not attend to give evidence on oath, the Tribunal will decide what weight to attach to that statement*. The fair-minded, informed observer would know that this letter was part of a sequence of correspondences seeking to get the claimant to attend, engage, by way of whatever reasonable adjustment necessary. Its comment on weight to be attached to evidence not given or challenged on oath would be known to the informed observer to be a normal application of principles of evidence and within the tribunal's proper exercise of its general power to regulate its own procedure and within the overriding objective to ensure the parties, so far as possible, were on an equal footing. I reject the suggestion that a fair minded, informed observer would see it as evidence of apparent bias.

Conclusion

Case law tells us that Tribunals, judges and non legal members, must have broad backs. They cannot recuse themselves because a party is not content with their decision or doesn't like the fact that there is to be a costs hearing in their case nor because, as the respondent submitted, it would be more comfortable for them to do so. A party in the British Legal System does not get to choose their own judge, nor does a judge get to choose her own cases.

I have given this application full consideration over the course of a day in Chambers. I have reviewed each piece of correspondence from the claimant, the respondent's submissions, the relevant law and all of the previous decision making in the case.

I have had regard to *Otkritie International Investment Management Limited and Others v Uromov [2014] EWCA Civ 1315* provided in submission by the respondent which said that a judge should not recuse themselves unless they consider that either they genuinely cannot give one or other party and fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that they would not do so.

None of the claimants arguments or grounds for recusal, either individually or taken together lead me to conclude that I cannot give the parties a fair hearing. They would not lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased.

The claimant's application for recusal fails. I will write separately to the parties to list a costs hearing and to, again, invite the claimant to provide evidence of his mental and physical conditions which he says prevent him from engaging and to invite him to request adjustments so that he can engage with the respondent in a fair costs hearing.

Employment Judge Aspinall
Date 23 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
30 January 2023

FOR EMPLOYMENT TRIBUNALS