Neutral Citation Number: [2023] EAT 45

Case No: EA-2020-000896-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 March 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MRS KRISTIE HIGGS **Appellant**

- and –

FARMOR'S SCHOOL **Respondent**

-and-

THE ARCHBISHOPS' COUNCIL OF THE CHURCH OF ENGLAND **Intervenor**

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- -

Mr Richard O'Dair (instructed by Andrew Storch, solicitors) for the **Appellant**
Ms Debbie Grennan (instructed by Browne Jacobson LLP, solicitors) for the **Respondent**
Ms Sarah Fraser Butlin (instructed by Herbert Smith Freehills LLP, solicitors) for the **Intervenor**

Hearing date: 16 MARCH 2023

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JUDGMENT

***This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.**
The date and time for hand-down is deemed to be 10:30 on 31 March 2023

SUMMARY

Practice and Procedure – application for recusal of lay member – fair hearing – appearance of bias

An application for recusal was made on the basis that an Employment Appeal Tribunal lay member, assigned to sit on the hearing of this appeal, had held office as the Assistant General Secretary of the National Education Union (NEU), which had (over the period relevant to the present appeal) taken a strong, public position, campaigning in respect of the issues at the core of the proceedings, thus giving rise to the appearance of bias.

Held: *allowing the application*

Applying the test of the fair-minded and informed observer (**Porter v Magill** [2002] 2 AC 357 HL), there was an appearance of bias such that the lay member should be recused from hearing the appeal.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This is my judgment on the application for the recusal of the lay member, Mr Andrew Morris, from the hearing of this appeal. The application is put on the basis of apparent bias, arising from Mr Morris' former position as Assistant General Secretary of the National Education Union ("NEU"), when that entity was campaigning on matters of educational policy, and had publicly expressed clear views, on the opposite side of a heated debate to the position of the claimant, which lies at the heart of this case.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is a hearing on the claimant's application sent to the EAT at 22:17 on 15 March 2023, the evening before the first day listed for the final hearing of the appeal. It was seen by me when it was forwarded by a member of the court staff at 09:16. At that point, I had not discussed the case with the lay members who had been allocated to hear this appeal and, other than mentioning this application and my proposal to deal with it sitting alone, I have had no conversation with either lay member regarding this matter at any stage.

3. The respondent does not consent to the application for recusal but has had insufficient time to consider the position more fully; the intervenor takes a neutral stance.

The Factual Background and the Underlying Proceedings and Appeal

4. The factual background relevant for the purposes of determining this application is as set out in my earlier recusal judgment in these proceedings, reported at [2022] ICR 1489. I do not repeat that history but note that the underlying employment tribunal claim relates to the sharing of social media posts in October 2018, one relating to a petition opposing the introduction of "*relationship education*" in primary schools; the other an article criticising what was portrayed as the promotion of ideas such as "*gender fluidity*" in

schools. Although the claimant disassociated herself from some of the language used in the texts that she re-posted on her Facebook page, it is right to say that she had deeply held concerns about government policy relating to teaching in schools on the subject of relationships. I understand that the claimant posted these texts at a time of public debate on this issue, given government consultation on proposed changes to how such matters should be addressed in schools. The claimant herself used the expression "BRAINWASHING OUR CHILDREN" when encouraging others to sign a petition protesting against mandatory relationship education in schools whereby (as the text the claimant re-posted stated):

> "children will be taught that all relationships are equally valid and 'normal', so that same sex marriage is exactly the same as traditional marriage, and that gender is a matter of choice, not biology, so that it's up to them what sex they are."

5. For its part, the respondent held concerns that the claimant's posts strongly criticised teaching in primary schools relating to same-sex relationships and issues around gender identity. It considered that the posts could reasonably be read as expressing or supporting views that were homophobic or transphobic. The claimant does not accept that was the case and, indeed, contends that the ET was perverse in finding that the respondent could reasonably reach such a conclusion. That is one of the issues raised by this appeal.

The Listing of the Appeal and the Recusal Applications

6. Although the relevant procedural history has been set out in my earlier recusal judgment in this case, it is helpful to repeat the following points. At a hearing under rule 3(10) **EAT Rules** before His Honour Judge Tayler on 13 July 2021, the matter was permitted to proceed to a full hearing to take place before a judge sitting with two lay members (see the order seal dated 14 July 2021).

7. The first listing of the appeal was for 1-2 March 2022. Due to an error on the part of the EAT administration, however, that was initially arranged to be before me, sitting alone. Given the earlier direction for this matter to be heard by a three-member panel, a request was sent out to all EAT lay members at short notice, to ask whether any would be available for the dates in question (the usual practice of the EAT is to allocate lay members on a strict, rotational basis). Within an hour of the request, lay members had been secured from each of the relevant panels (representatives of employers; representatives of workers – see section 22 **Employment Tribunals Act 1996** ("ETA")). Accordingly, the full hearing of the appeal was then listed to be before myself, Mx C E Lord and Mr A D G Morris. Consistent with the EAT's normal practice, the composition of the panel for the hearing of the appeal (with the lay members identified as set out above) would have been apparent from the publication of the cause list during the course of Friday 25 February 2022.

8. On Monday 28 February 2022 an urgent application for an adjournment was received due to the ill-health of one of the representatives in the case. This was unopposed and was duly allowed, with the direction that the matter would be re-listed for the first available date, stating that this might not be before the same panel.

9. The full hearing of the appeal was re-listed for Wednesday 22 and Thursday 23 June 2022. In the event, the same panel members were available and the matter was therefore due to be heard by myself, sitting with Mx Lord and Mr Morris. Again this would have been obvious to all concerned from the publication of the EAT cause list the week before.

10. On 23 May 2022, the claimant's solicitors wrote to the EAT raising concerns that Mx Lord had made public statements on social media relating to key issues in the appeal and had expressed strong views on matters of controversy that were "*at the heart of this case*", such that there could be an appearance of bias. They asked that Mx Lord should recuse themselves from hearing this matter as a lay member. After having investigated the position, I directed

that this matter should be set down for a hearing. As it would not be possible to hear the recusal issue in advance of the proposed listing of the appeal, I directed that the question of recusal should be listed before me, sitting alone, on 22 June 2022 and that the appeal would therefore be postponed pending determination of this question. I gave further directions for the conduct of the recusal hearing. To ensure that all relevant argument was before the EAT at the recusal hearing, I requested that the Attorney General appoint an Advocate to the Court.

11. By my reserved judgment, handed down on 5 July 2022, I held that Mx Lord should be recused from hearing this matter and the appeal should be re-listed for the first available date, with Mx Lord being replaced by another lay member drawn from the same panel.

12. Although the identity of the other lay member allocated to hear this appeal, Mr Morris, would thus have been known to all concerned since February 2022, no issues relating to his involvement were raised until late during the evening before the re-listed hearing. Mr O'Dair has made the point that the EAT would not necessarily re-list an adjourned hearing before the same panel, and it is certainly true that I had made that observation when allowing the application to postpone the original hearing in February 2022. That, however, does not alter the point that Mr Morris' background as a trade union official with the NEU has been in the public domain throughout and no objection had previously been raised in respect of his allocation to this hearing. That remained the position even after the issue of recusal had been raised in relation to Mx Lord, and notwithstanding the indication in my direction at the end of my 5 July 2022 judgment. It is unfortunate (I put it neutrally) that this matter was left until very late during the evening before the re-listed hearing of the appeal.

The Claimant's Case for Recusal

13. Turning then to the current application, those acting for the claimant have placed reliance on the following matters:

"According to the information publicly available on the Internet, Mr Morris was the Assistant General Secretary of National Education Union (NEU) between September 2017 and March 2022. We understand that to be one of the most senior positions within the NEU.

Before, during and after the events giving rise to the Claimant's claim, the NEU has consistently taken a strong position in favour of (a) making both relationship and sex education mandatory in primary schools and (b) encouraging teaching children at primary schools about same-sex relationships and transgenderism. In other words NEU, with Mr Morris as a prominent member of its leadership, was an active participant in the societal and political debate which was central to the facts of this case. The Claimant made social media posts which argued the opposite views to those of the NEU, which were seen by the Respondent as misconduct and caused her dismissal. In those circumstances, a reasonable and well-informed observer would not see Mr Morris as an impartial judge for this appeal.

We rely in particular on the following material published by the NEU at the relevant time:
(1) ***NEU response to Relationships and Sex Education Guidance***, 27 February 2019: https://neu.org.uk/neu-response-relationships-and-sex-education-guidance. That was one day after the Respondent in this case rejected the Claimant's appeal against her dismissal, in response to the government's act which the petition which the Claimant had shared sought to oppose. The document states:
'*The NEU welcomes the Government's new statutory guidance for relationships and sex education in schools. This is a huge step in the right direction to ensure all children and young people have access to age-appropriate, inclusive and high quality RSE.*
'There is consensus within the profession that RSE is vital to ensure that children can stay safe and develop healthy, equal and enjoyable relationships. The new guidance brings RSE into the 21st century to better reflect the complexity of children and young people's lives today, including how to navigate the online world.
'We know that many schools are delivering excellent RSE but there are key areas that children and young people say they want to learn more about including LGBT+ relationships, sexism and sexual harassment and healthy and unhealthy relationships. That is why we are pleased to see content in the guidance stating that RSE should be LGBT+ inclusive'
(2) LGBT+ inclusion update published on 23 July 2019: https://neu.org.uk/blog/lgbt-inclusion-update.
The update shows NEU's strong support to the 'Pride' movement and participation in numerous 'Pride' events in 2019, including such events at schools. It then states:
'However, Pride season 2019 has taken place against an unsettling backdrop. The consequences of rising intolerance and division have made headlines all year. Hate crimes continue to increase with homo, bi and transphobic hate crime doubling in the last 5 years. ***The well-resourced anti-LGBT+ education lobby have made headlines this spring and summer, with their actions seriously damaging teacher mental health, spreading misinformation and negatively affecting pupils' self-esteem and access to education***.' (Emphasis

added). The phrase 'well-resourced anti-LGBT+ education lobby' is hyperlinked to the BBC report about the 2019 protests in Birmingham against teaching primary school children in same sex relationship and transgenderism. The concerns of the protestors attacked by NEU in those terms appear to be very similar to those articulated in the Claimant's Facebook posts.
The 'update' further states that:
- *'The NEU's national conference in April selected an Urgency Motion on LGBT+ inclusion for debate, putting this at the heart of policy and campaigning work.'*
- *'In July, the joint General Secretaries wrote to Ministers demanding they clarify that all education settings must be LGBT+ inclusive'*
(3) **Every child, every family. Building LGBT+ inclusion through** reading (31 January 2020, https://neu.org.uk/publications/every-child-every-family) is an annotated catalogue of books about same-sex relationships and/or transgenderism aimed at primary school aged children. The foreword by NEU Joint General Secretaries states:
'This resource will help you to promote LGBT+ inclusion through reading. […]
'Order these books for your school or classroom. Share this resource with colleagues and table it on an INSET agenda. […]
'Using these books, and the teaching notes for each title, will open up straightforward ways to talk with children about different kinds of families and relationships. […]
'We haven't specified which key stage these books relate to as you should feel free to use them flexibly across age groups. The law requires primary schools to advance LGBT+ equality but the impetus behind this area of teaching should surely be values-based. […] Relationships and sex education is of course one part of the curriculum which needs to be inclusive of LGBT+ families. But this guide will help you to think about how your school can use books and reading across the whole of your curriculum, and bring to life your values of inclusion to life.'
(4) Relationships Education and Relationships and Sex Education (RSE). NEU Guidance for members in England, published at NEU web-site at https://neu.org.uk/media/7681/view. The Guidance states the NEU position that:
- '***The NEU recommends that all primary schools teach sex*** *education*' (emphasis in the original) despite that being not required by law – p. 4.
- '*The NEU believes all Relationships Education and RSE should be LGBT+ inclusive, promote gender equality and actively challenge all forms of abuse and discrimination'* - p. 7.
- '*The RSE guidance states that all schools should teach their pupils about LGBT+ people when they consider it appropriate to do so.* ***The NEU believes it is appropriate to do so in every school and that Relationships Education and RSE should be LGBT+ inclusive at every key stage.***' – p. 9 (emphasis in the original)."

14. Those acting for the claimant say that this is only a small selection from a much wider volume of similar material available on the NEU website, which, it is said,

> "… shows NEU's strong stance on those issues, which are diametrically opposed to the stance taken by the Claimant which resulted in her dismissal."

15. On behalf of the claimant, it is submitted that the NEU has thus taken a position in a heated public debate, which is very much opposed to that adopted by the claimant. More than that, it is said that the NEU has taken a campaigning stance, lobbying the government for a particular approach to be taken to "*relationships education*" that is entirely contrary to the position adopted by the claimant in the social media posts to which this appeal relates.

The Respondent's Position

16. Although unable to take instructions on the application, for the respondent (and thus being unable to indicate what her client's position might be on the question of recusal), Ms Grennan has pointed out that there can be a distinction between an individual's public expression of their personal views and the association of views with an organisation by which someone is employed, or in which they hold office. The respective positions of the lay members in question are not the same.

The Relevant Legal Principles

17. The claimant does not suggest that the lay member in this case should be recused by reason of actual bias or automatic bias (see the discussion of these categories of cases in **Locabail (UK) Ltd v Bayfield Properties** [2000] QB 451 CA at paragraphs 3-14); the application for recusal is put on the basis of apparent bias, as defined by Lord Hope of Craighead at paragraph 103 **Porter v Magill** [2002] 2 AC 357 HL:

> "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. As I reflected in my earlier recusal judgment in these proceedings, the underlying purpose of the law on apparent bias is that not only must justice be done, but it must be perceived by the

public to be done (see per Lord Hope in **Davidson v Scottish Ministers** [2004] UKHL 34 at paragraph 46); "*bias*" for these purposes is a shorthand:

> "47. … it would be a mistake to approach it in this context as if its only meaning were pejorative. The essence of it is captured in the [European] Convention [of Human Rights] concept of impartiality. An interest in the outcome of the case or an indication of prejudice against a party to the case or his associates will, of course, be a ground for concluding that there was a real possibility that the tribunal or one of its members was biased …. But the concept is wider than that. It includes an inclination or pre-disposition to decide the issue only one way, whatever the strength of the contrary argument. A doubt as to whether this is the case is enough, so long as it can be justified objectively."

19. In **R v Gough** [1993] AC 646 HL at p 670 (see the citation at paragraph 16 **Locabail**), Lord Goff considered apparent bias would arise in circumstances where the judge:

> "might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him".

20. In **President of the Republic of South Africa v South African Rugby Football Union** 1999 (4) SA 147, at 177, the question was characterised as whether:

> "the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." (See the citation at paragraph 49 **Lauchlan v Her Majesty's Advocate Scotland** [2013] UKSC 36 HL).

21. To similar effect, in **Bates v Post Office Ltd** [2019] EWHC 871 QB at paragraph 29, Fraser J stated:

> "Bias includes giving the impression of having pre-judged any issue."

22. It is, moreover, clear that this can extend to unconscious bias, see **Locabail** at paragraph 89, and per Lord Woolf in **AT & T Corpn v Saudi Cable Co** [2000] 2 Lloyd's Rep 127 (cited with approval by Lord Hodge in **Halliburton Company v Chubb Bermuda Insurance Ltd** [2020] UKSC 48 at paragraph 122).

23. The same test for apparent bias applies equally to judges, lay members of tribunals, jurors and arbitrators, see **R v Gough** p 670. And while the fact that a judge or lay member will have taken a judicial oath is a relevant consideration, it is:

> "an important protection"

but *not*

> "a sufficient guarantee to exclude all legitimate doubt"

per Lord Reed in **Starrs v Ruxton** 2000 JC 208 at 253 (cited by Lord Bingham of Cornhill at paragraph 18 **Davidson**).

24. In considering whether a judge or lay member who has been assigned to hear a particular case should be recused on the ground of apparent bias, the issue must be resolved by applying an objective test: it is the perspective of the fair-minded and informed observer that is relevant and thus neither the subjective view of the person alleging possible bias, nor the assertions of the person of whom potential bias is alleged, are likely to be particularly helpful, see **Porter v Magill** at paragraph 104. The threshold for recusal is, however, whether the fair-minded and informed observer would conclude there was a "*real possibility*", not whether they would conclude there was a "*probability*"; that means that if there is real ground for doubt, it should be resolved in favour of recusal, see **Locabail** at paragraph 25.

25. As for the construct of the fair-minded and informed observer, as Lord Hope explained in **Helow v Advocate General for Scotland** [2008] 1 WLR 2416:

> "2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses.

> She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

26. The determination of the test will always be fact sensitive, as was made clear in **Locabail** at paragraph 25:

> "Everything will depend on the facts, which may include the nature of the issue to be decided."

27. Finally, if I determine that the apparent bias test is met, there is no discretion as to whether a judge or lay member should be recused: they must be, see **Axnoller Events Ltd v Brake** [2021] EWHC 949 Ch at paragraph 52. And that must be so, no matter if that unfortunately gives rise to a further delay in adjudicating upon the case or has other undesirable consequences: to do otherwise would be a denial of the right to a fair hearing.

Discussion and Conclusions

28. As explained in the earlier recusal judgment in this matter, a judge in the EAT can sit with two or four "*appointed members*" (section 28(2) and (3) **ETA**); appointed members - more commonly referred to as "*lay members*" – being persons:

> "who appear to the Lord Chancellor and the Secretary of State to have special knowledge or experience of industrial relations either (a) as representatives of employers, or (b) as representatives of workers." See section 22(2) **ETA**.

29. The decision whether the appeal should be listed before a panel that includes lay members requires the exercise of judicial discretion and will inevitably be appeal-sensitive. Thus, where a matter is listed before a three (or, very exceptionally, five) member panel, that

will be because a judge has taken the view that the hearing of the appeal would benefit from the knowledge and experience of lay members.

30. Standing in the shoes of the fair-minded and informed observer, I am aware of this background context when considering the issues raised by the present application. I recognise that the broader experience of lay members, which can be of such value in the EAT, may also mean that some will be involved in campaigning organisations, which may have taken a very public stance on current social and political issues in a way that would not be considered appropriate for a judge. Indeed, the broader, industrial experience of the lay members of the EAT (perhaps most obviously for those drawn from trade unions, but potentially also arising for those who have employer-side experience) will often derive from their roles within such organisations. The very experience that can provide such invaluable insight in some cases can, therefore, also mean that it would be inappropriate for such lay members to sit on an appeal that is likely to require them to reach judgements upon policies or issues on which they could be said to have already been associated with a particular "side" (and see the discussion in **Hamilton v GMB (Northern Region)** UKEAT/0184/06 at paragraphs 45-47) .

31. In the present instance, none of the material relied on by the claimant was published or communicated by the lay member concerned, nor could it possibly have been understood to relate to them in their capacity as a lay member of the EAT. That said, as the **Guide to Judicial Conduct** recognises, all those who hold judicial office (a term that includes lay members) must be alive to the difficulties that may arise from extra-judicial activities that might give rise to a reasonable apprehension of bias. Specifically, the question that I have to consider is whether such an appearance of bias arises in the context of the public statements of the trade union in which this lay member held senior office.

32. In answering that question, as an informed observer, I keep in mind the fact that the lay member has publicly taken the judicial oath and has thus given a solemn promise to "*do right to all manner of people*" in accordance with the law when determining any matter before them "*without fear or favour, affection or ill will*". I am also aware, however, that there is a danger of unconscious bias and, as I have previously stated:

> "where someone has given public voice to what are clearly very firmly held views relevant to the case before them, [the impartial, informed observer] would be more likely to doubt that they would be able to bring an impartial mind to bear on the adjudication of that case." (paragraph 48 **Higgs** [2022] ICR 1489).

33. Standing in the shoes of the informed observer, I need to take account of the on-going debate in our society relating to the issues raised by the claimant in her Facebook posts, and as addressed in the various statements made by the NEU. These matters give rise to important considerations relating to freedom of speech and to the right to hold and to manifest particular beliefs (and see the discussion in **R (Miller) v College of Policing** [2020] EWHC 225 Admin, and [2021] EWCA Civ 1926). They can present particularly difficult issues in the employment context (the immediate concern of this appeal), but they also reach into other areas; in the current proceedings, most obviously in the sphere of education: as to what should be taught in our schools and as to the values that we, as a society, wish to promote to our children.

34. More specifically, in the present case, one of the grounds of appeal raises the question whether the employment tribunal erred in law, or reached a perverse conclusion, in finding that it was reasonable for the respondent to conclude that third parties reading the claimant's Facebook posts could consider that she was homophobic or transphobic. The EAT will be asked to determine whether the employment tribunal's finding was one that was open to it on the material in question. It is the claimant's case that the concerns she was seeking to raise could be seen as very similar to those held by what has been

characterised by the NEU as the "*well-resourced anti-LGBT+ education lobby*", which it considered had been "*spreading misinformation*".

35. In the present instance, so far as I am aware, the lay member concerned has not himself publicly expressed any views on either side of the debate on any of these issues. He was, however, at the relevant time, the Assistant General Secretary of an organisation that campaigned on precisely the areas of debate identified in the claimant's Facebook posts and which had taken a side in that debate. The pronouncements made by the NEU were, moreover, not merely expressions of an organisational viewpoint on a matter of current interest (as many trade unions and employers' associations might be expected to make), but of a particular association that had, on behalf of its members, a very real interest in the issues in question, and which had taken on a campaigning role in this respect. Whether or not Mr Morris agreed or disagreed with all (or, indeed, any) of the pronouncements in question, by virtue of the office he held at that time, he will inevitably be associated with the views expressed, which were very clearly on the opposite side of the debate to that of the claimant. In determining whether the claimant's posts might be considered to be homophobic or transphobic, the reasonable observer might legitimately perceive that someone who had held office as Assistant General Secretary of the NEU at the relevant time would (even if only unconsciously) seek to maintain the position that had been very clearly adopted by that organisation.

36. I emphasise that I have no reason to doubt that, in all cases on which he might sit in the EAT, Mr Morris would seek to be true to his judicial oath. The position here is that, by virtue of his former role as Assistant General Secretary of the NEU, this lay member has been publicly associated with views expressed on one side of a matter of the debate that is at the heart of the present appeal. More than this, unlike the position that might arise when (for example) a trade union adopts, in more general terms, a position on a matter of current

public and/or political interest, the organisation in which Mr Morris held senior office had a very direct and obvious interest in the issues at the heart of the debate in question; after all, its members would be engaged in delivering the messages to which the claimant was objecting. For entirely understandable reasons, the NEU had not only taken a public stance on these issues but had adopted a campaigning role, as would be entirely appropriate for a trade union in an area of such interest to its members. In the circumstances, whatever might in fact be Mr Morris' personal position, the impartial observer, so informed, would be bound to conclude that there was a real possibility that he would unfairly regard the claimant's case with disfavour.

37. I accept the point made by Ms Grennan, that there is a distinction between the position of Mr Morris and that of Mx Lord. It may also be the case that, had there been time to investigate the position more thoroughly, there would be other evidence available that would dispel the concerns that I have found would have been possessed by the impartial observer in this instance. Unhappily, the timing of this application has meant that it has not been possible to undertake the further enquiries that might otherwise have been desirable. In reaching my judgment, on the information available, I am satisfied that there is real ground for doubt such as to mean that this application should be resolved in favour of recusal (per **Locabail**, paragraph 25).

38. Although the timing of this recusal application has been unfortunate, I accept that the primary obligation to identify these matters must rest with the individual judicial office holder. It would not be appropriate for EAT judges, presiding over a three-member appeal panel, to seek to carry out investigations into the background and pronouncements of lay member colleagues. While the publication of the cause list provides parties with an opportunity to check for any obvious conflicts, lay members must themselves be astute to identify any potential issues that might give rise to questions of this nature. In some cases,

the conflict will be obvious. Where, however, the issue might seem to be more nuanced, the lay member should, as I previously stated, raise the matter with the relevant judge, who will be best placed to determine how to proceed (see paragraph 55 **Higgs** [2022] ICR 1489, essentially reiterating the guidance provided at paragraph 53 **Hamilton**).

Disposal

39. For the reasons provided, the application for the recusal of Mr Morris is allowed.

40. Having announced my decision on the application in open court, the parties and the intervenor addressed me as to the preferred way forward in this appeal. There was consensus that the interests of justice would best be served by my proceeding to hear the appeal sitting alone. Having regard to the uniform preference for this course, and weighing in the balance the desirability of having lay member input as against the further delay that would then arise, I took the same view: having regard to the overriding objective, the interests of justice in this case would be best served by my reviewing the earlier order of HHJ Tayler and varying his direction so that the full hearing of the appeal would be determined by a judge, sitting alone.