EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
1. Chloe Naylor	**v**	**1. Hugh Sims-Hilditch**
2. Megan Anderson		**2. Hildare Stud Farm Ltd**

ORDERS

Made pursuant to the Employment Tribunal Procedure Rules 2013

Decision on application for recusal of Employment Judge Hogarth:

1. The claimants' application for Employment Judge Hogarth to recuse himself on the grounds of bias from future involvement with the reconsideration of his judgments dated 8 December 2022 is refused. Reasons for the refusal are given below.

Claimants' reconsideration application

2. On 14 March 2023 the parties were notified that Employment Judge Hogarth had decided under Rule 72(1) of the Employment Tribunals Rules of Procedure 2013 that the claimants' application for reconsideration was not rejected at the initial stage as having no reasonable prospect of success. Accordingly, the application falls to be determined by Employment Judge Hogarth, in accordance with Rule 72(3).
3. The parties have given their views in writing as to whether the application should be determined without a hearing. Having had regard to those views, Employment Judge Hogarth has decided that the reconsideration will take place at a hearing. Reasons for the decision are given below.
4. The reconsideration hearing will be the subject of separate Case Management Orders.

REASONS

Procedural background to the claimants' recusal application

The original claims

1. These proceedings relate to claims for unfair dismissal and associated pay matters arising from the claimants' dismissal on 8 July 2021 from their employment with the second respondent (Hildare Stud Farm Ltd) as grooms at a stud farm.
2. Claim forms were presented by Mr Adrian Naylor (the first claimant's father, who has acted for the claimants from the outset) for each claimant in similar terms. The two sets of claims have since been consolidated.

3. The claims were originally made by against Mrs Anna Sims-Hilditch and Mr Hugh Sims-Hilditch. The claims against Mrs Sims-Hilditch were rejected by the Tribunal for want of an Early Conciliation ("EC") certificate naming her as a prospective respondent. For some reason it was not noticed at the same time that the claims against Mr Sims-Hilditch were also a nullity owing to the absence of an EC Certificate naming him. The claims against him were not rejected at the outset.
4. Each claim form refers to an EC certificate, but the certificate names "Hildare Stud Limited" as the prospective respondent. That name is inaccurate, but the respondents accept that it refers to "Hildare Stud Farm Limited". In these Reasons I will refer to that company as "Hildare".

Telephone Case Management Preliminary Hearing on 30 August 2022

5. A telephone case management preliminary hearing was held before EJ Cadney on 30 August 2022. His Case Summary states that Mr Naylor accepted at the hearing that it was Hildare (and not Mr Sims-Hilditch) who was the claimants' employer when they were dismissed. It also states that the claims against Mr Sims-Hilditch were bound to fail for that reason, but he was being retained formally as a respondent to avoid technical difficulties. He added Hildare as a respondent, on the basis that that did not prejudice its right to object to being added as a party, as it was not represented at the hearing. He ordered a further Preliminary Hearing to take place.
6. Hildare, as the second respondent, has presented a response to the claims against it. It objected to being added as a party based largely on the claims being well out of time on 30 August 2022 (when EJ Cadney added it as a party).

Preliminary Hearing on 7 December 2022

7. On 7 December 2022 a Preliminary Hearing took place before me, at the end of which I gave an oral judgment striking out the claims against both respondents under Rule 37 as having no reasonable prospect of success. Written reasons were sent to the parties on 28 February 2023.
8. The claims against the first respondent were bound to fail. He was never the claimants' employer and the claims in this case only lie against their employer. Also, the failure to obtain an EC Certificate naming him before making the claims made them a nullity from the outset, which means the Tribunal has no jurisdiction over them. That conclusion is not affected by the failure by the Tribunal to reject them when presented. At the hearing on 7 December Mr Naylor did not resist the conclusion that the claims against the first respondent should be struck out. He was, though, clearly disappointed by that, as he regards Mr Sims-Hilditch as responsible for the claimants' dismissal.
9. The claims against the second respondent were struck out on the basis that the claimants had no reasonable prospect of success in establishing that time should be extended to allow the claims to proceed. The claims were made against the second respondent when it was added as a party (30 August 2022) - well outside the initial period of 3 months (plus EC extension) allowed by section 111(1)(a) of the Employment Rights Act 1996 ("ERA 1996"). Further, because the original claims against the first respondent were a nullity from the outset, I concluded that the only basis for retaining the second respondent as a party was if the claimants had a reasonable prospect of showing that time should be extended under section 111(2)(b) of ERA 1996. The test under that provision requires claimants to be able to show (a) that it was not reasonably practicable to bring the claims against Hildare in

time, and (b), if so, that the claim was then brought within a reasonable period thereafter. If either condition is not met no extension of time is possible.

10. Mr Naylor gave his explanations as to why the claims were not made against Hildare in time. These are described in the written reasons. The difficulty he was in at the hearing was that, among other things, he needed to explain why, having obtained two EC Certificates correctly naming Hildare as prospective respondent, he failed to name it in the claim forms as the respondent. Hildare was the claimants' employer at the time of dismissal, which suggests strongly that when he notified ACAS of the claims, Mr Naylor was aware of the requirements for bringing an ET claim and had correctly identified Hildare as the correct respondent. After hearing the parties' submissions, I concluded that the claimants had no reasonable prospect of success in establishing that time should be extended in their favour.

Events since 7 December

11. Mr Naylor has applied for a reconsideration of my judgments striking out the claims against Hildare. In accordance with Rule 72(1) I considered whether the application should be refused because there was "no reasonable prospect of the original decision being varied or revoked". If a reconsideration application is refused, the only recourse for the applicant is to appeal the original decisions to the Employment Appeal Tribunal.
12. My decision was that the reconsideration application should not be refused at the outset. I did not consider that the test under Rule 72(1) was met. The law limits the circumstances in which it is proper to use the power to vary or revoke a decision on reconsideration (owing to the importance of finality in ET proceedings) and I considered that the application raised issues that merit consideration before any final decision is made.
13. The parties were notified on 14 March 2023 of my decision. Both parties have since made written representations about the application, including in particular on the question whether a hearing is necessary.
14. Under Rule 72(3) it falls to the Employment Judge who made the original decision, where practicable, to carry out the reconsideration. However, on 27 March 2023 Mr Naylor sent a letter to the Tribunal asserting that my continued role in this case would be unsafe and unethical, and that the reconsideration of my judgment in the two joined cases should be carried out by another judge. I read that letter as an application for me to be recused on the basis of apparent bias. Subject to determining that application, there is no other impediment to me dealing with the reconsideration.
15. The letter of 27 March sets out brief grounds for the application for recusal, which echo points made in Mr Naylor's earlier letter of 27 December 2022 seeking the reconsideration of my judgments. The respondents' counsel (Mr Roberts) made written submissions commenting on Mr Naylor's assertions about bias in the respondents' Response to the reconsideration application dated 5 May. Mr Naylor subsequently submitted a further document commenting on the respondent's submissions. I have taken account of all these documents.
16. Regional Employment Judge Pirani has directed me to deal with the application for recusal, in accordance with established Tribunal practice for dealing with such applications. On 15 June 2023 the parties were notified that I had directed that, if they wished to make further representations on the recusal application, they should do so within 7 days. In response, Mr Naylor sent a helpful one-page letter dated 18 June 2023 summarising his complaints about "perceived bias" on my part.

The grounds for the claimants' recusal application

17. Mr Naylor's letter to the Tribunal of 18 June 2023 states that:

> *"...*
> *The claimants' reasons for requesting the recusal of Judge Hogarth are listed in full within the communications to the Tribunal dated 28th December 2022 and 28th May 2023.*
> *The claimants concern about perceived bias, are respectfully re-stated below,*
> *To establish the correct name of their employer and clarify the company structure prior to the submission of the ET1, the claimants sent four e- mails to the respondents requesting the information. The requested information was not supplied, despite the intervention of the Information Commissioner's Office.*
> *1. When referring to this evidence, Judge Hogarth remarked, 'I suspect the respondents counsel will see this as a red herring'. This comment was both unqualified and based on supposition, further, Judge Hogarth did not explain the rationale for his comment. It is the claimant's contention that the comment was bias towards the respondents and the respondents' counsel.*
> *2. Judge Hogarth also dismissed the claimant's documentary evidence which stated the claimants were employed by Urathon Ltd, again without rationale.*
> *3. The judge accepted on face value, the assertion of the respondent's counsel, who stated that the claimants were employed by Mrs Sims Hilditch as a sole trader, no documentary evidence in the form of HMRC / PAYE records were produced or requested in support of this statement.*
> *4. Referring to another item of evidence concerning the naming of the employer on the claimants' payslips, Judge Hogarth remarked, 'I expect the employer probably didn't have time to change them'. This remark is speculative and not based on fact, it is further evidence of bias in support of the respondent's case.*
> ***5**. It is the claimant's opinion that points above constitute apparent bias as defined in the test devised in Porter v Magill."*

18. The specific matters raised are considered below. The reference to "28 May 2023" in the first paragraph quoted above appears to be a misprint for "27 March 2023". The Tribunal has no record of any letter dated 28 May.

Relevant law: recusal of judges

19. The application is based on apparent bias. The legal principles in such a case are helpfully summarised in *Ansar v Lloyd's TSB Bank Plc [2007] IRLR 211 (*Court of Appeal) as follows.

20. The test to be applied as stated by Lord Hope in *Porter v Magill* [2002] 2 AC 357, at paragraph 103 and recited by Pill LJ in *Lodwick v London Borough of Southwark* at paragraph 18 in determining bias 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.

21. If an objection of bias is made, it will be the duty of the 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: *Locabail (UK) Ltd v Bayfield Properties Ltd*.

22. 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.

23. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application.

24. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection.

25. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in *Lodwick*, recited by Cox J in *Breeze Benton Solicitors (A Partnership) v Weddell* [2004] All ER (D) 225.

26. 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.

27. 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.

28. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal.

29. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise if:
    (a) there were personal friendship or animosity between the judge and any member of the public involved in the case;
    (b) 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;
    (c) in a case where the credibility of any individual were an issue to be decided by the judge, the judge 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;

(d) on any question at issue in the proceedings before him the judge had expressed views, particularly during the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or

(e) (e) for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues.

30. In addition to the general principles approved by the Court of Appeal in *Ansar*, I mention also the case of *Otkritie International Investment v George Urumov [2014] EWCA Civ 1315*. In that case the judge considered an objection of apparent bias based on his previous decisions in the same case and decided to recuse himself, a decision reversed by the Court of Appeal. The Court of Appeal reviewed the circumstances in which a judge should recuse themselves for bias and emphasized the importance of the same judge dealing with the case save in exceptional circumstances. The fact that he had previously made decisions adverse to a party did not (without more) mean that a party could object to the future involvement of the judge in the case. The Court of Appeal referred to a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences". This is because of the risk that if judges are too ready to recuse themselves litigants will be able, in effect, to distort the process for allocating cases to different judges.

Analysis of the claimants' grounds for asserting apparent bias

Preliminary observations

31. It was my task on 7 December to give both parties a fair opportunity to make their respective cases before determining the dispute between the parties on the basis of the applicable law, the documentary evidence and the parties' respective submissions. It was not the function of a judge in an employment tribunal to undertake an inquisitorial function on behalf of either of the parties.
32. Mr Naylor disagrees with my decision to strike out the claims against the second respondent. The established means of recourse for a party who is dissatisfied with a decision of an Employment Judge is to appeal to the Employment Appeal Tribunal. Mr Naylor can of course put forward an appeal on any grounds he wishes, but the only question I can address in considering his recusal application is whether he has identified any substantive grounds for his allegation of apparent bias.
33. The law is clear that a decision made in favour of a party is not itself evidence of bias, without more. The judge must decide matters in dispute and it is often the case that the losing party disagrees with the decisions: that does not mean the judge was biased.
34. Mr Naylor describes his objection to my reconsidering my decisions as one of "apparent bias" on my part, referring to the legal test in *Porter v Magill:* whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. He is not, as I understand it, saying that there was actual bias on my part, in the sense that, for example, I was personally acquainted with a party or a likely witness. For clarity I should record that,

as far as I am aware, I had never met or heard of any of the persons involved in this case (including counsel) before I was allocated the hearing. Nor have I had any contact with anyone involved in the case, other than at the video hearing on 7 December 2022 and, indirectly, in correspondence sent to the Tribunal and made available to me or sent to the parties on my behalf by Tribunal staff.

35. Having made those preliminary observations, I will endeavour to deal with the specific points raised in Mr Naylor's recusal application. I will focus mainly on the matters referred to in his letter of 18 June (reproduced in paragraph 17 above) but I have also considered whether anything else in his letters of 28 December 2022 and 27 March 2023 might be constitute an allegation of bias.

The identity of the claimants' employer at different times

36. Before addressing Mr Naylor's specific complaints, I will say something about a particular issue which was for some time in dispute, namely the identity of the claimants' employer at the date of dismissal and previously. The respondent's position has always been that their legal employer between 8 September 2020 and 8 July 2021 (the dismissal date) was Hildare and that they were dismissed by Hildare. However, for a time after the claims were presented, Mr Naylor maintained that Mr Sims-Hilditch was the claimants' employer.
37. In his Case Summary of 31 August 2022 EJ Cadney states at paragraph 24 that Mr Naylor accepted, at the hearing on 30 August, that the claimants' employer at the date of dismissal was Hildare. That fact was also asserted by Mr Naylor in earlier correspondence with the Tribunal: in a letter dated 22 August he said "*The claimants Miss Chloe Naylor (CN) and Megan Anderson (MA) were salaried employees of Hildare Stud Farm Ltd, their payslips evidence this fac*t", although the letter does goes on to say they regarded Mr Sims-Hilditch as their employer. In an earlier letter dated 14 April 2022 he referred to the claimants being paid by Hildare following its formation.
38. At the hearing on 7 December 202 I did not understand Mr Naylor to dispute that Hildare was the relevant employer. Indeed, document 2 in Mr Naylor's supplementary bundle for the 7 December hearing is an email sent by "Rob Taylor" in September 2021 informing the first claimant that her employment with Hildare began on 8 September. This was in response to a request for details of her employment dates with Hildare, a request which suggests that she was already aware, before sending her email, that she had been employed by that company. The email exchange also mentions "Urathon" (a different company) as a possible employer prior to Hildare, a matter I return to below. It appears that the first claimant may have thought her previous employer to Hildare was Urathon, but Mr Taylor (who appears to have been an accountant working for Urathon) said in his reply to her email that she had never been employed by that company.
39. It appears that Hildare became the claimants' employer on 8 September 2020 under the TUPE Regulations following a business transfer. The respondents' position has always been that prior to that date their employer was Mrs Anna Sims-Hilditch (as an individual), and that hers is the name appearing on their pay slips at that time. However, Mr Naylor asserted at the hearing on 7 December 2022 that his documentary evidence shows that Urathon Europe Limited was their employer.
40. On 7 December 2022 Mr Naylor clearly considered that the question whether Urathon was their previous employer mattered, although the claimants have never brought claims against that company. I understood him to be saying that the fact Urathon had been the employer was part of his explanation for getting confused as to who should be the respondent in the ET1 forms he presented for the two

claimants. Beyond that, I could not see how the identity of the employer prior to 8 September 2020 was of any direct relevance to the question whether the claims against Hildare should be struck out.

41. The documentary evidence available to me as to the identity of the original employer was limited – for example there were no employment contracts or dismissal letters in the bundle. But there were three documents put forward by Mr Naylor which, he said, suggested the employer was Urathon Europe Ltd. In two of them, the first claimant was held out as an employee of "Urathon Europe Limited" during the first COVID lockdown
42. The first of those documents (document 4) is an undated letter on notepaper headed "Urathon, Solutions in Technology, Urathon Europe Ltd, Thane House, Hilmerton, Calne SN11 8SB" stating that "Chloe Naylor is a key worker in Urathon" described as "a major supplier of medical equipment to the NHS" and asking the holder to be afforded free travel to and from work. It appears to be signed by the CEO Lindsey Muir. There is a handwritten annotation which appears to bear the signature of another director dated "24.03.20". So it appears to have been produced soon after the lockdown was called. However, the suggestion in the document that Ms Naylor was somehow involved in Urathon's medical equipment supply business is not true, since she worked as a groom at a stud farm. At the hearing on 7 December I saw that as undermining its reliability as a statement of who her employer was.
43. The second document (document 5) is dated 1 April 2020 and is on headed notepaper bearing a logo for "Urathon Solutions in Technology". This is signed by Anna Sims-Hilditch and "confirms" that Chloe Naylor is employed by Urathon Europe Ltd in the capacity of the welfare, feeding, medical care and other day to day requirements of caring for horses". The letter emphases the importance of her role in caring for the horses at Thane House and requests that she continues to travel to work. The letter invites the reader to contact the author for confirmation of their name and employment with Urathon. This describes her work accurately and states that Ms Naylor was an employee of Urathon Europe at the time.
44. I was not given any explanation by the respondents as to why the documents stated facts that were not, or might not, be true. However, it must be possible that (assuming she was the employer at the time) Mrs Sims-Hilditch thought at the start of the first COVID lockdown, when things were very uncertain, that a document bearing Urathon's name would carry more weight than one bearing her name.
45. For the purposes of deciding who the employer was at the time, the two documents are clearly relevant. My view on 7 December 2022 was that they were evidence, but not conclusive proof, as to who the employer was. Mr Naylor also relied on his document 3, which appears to be an extract from a bank statement showing 4 salary payments to the first claimant in 2020 as having been made by Urathon Europe. My view was that this document is consistent with the employer being Urathon but, again, not conclusive proof. If the employer was an individual it would not be that surprising, in my view, for payroll matters and the salary payments to be dealt with by a third party with the right expertise and systems and a company bank account.
46. Two other documents in Mr Naylor's supplementary bundle are potentially relevant to this question. Document 8 is an undated screenshot of an email from Hugh Sims-Hilditch telling Ms Naylor that "the only information we have on you" is that held by the persons who made payments to you in connection with "your" employment with Anna Sims-Hilditch and Hildare Stud Farm. Mr Sims Hilditch's name signing off the email is followed by "Executive Chairman, Urathon Europe Ltd, Urathon China Ltd". And document 9 is a similar screen shot of an email from Mr Sims-Hilditch saying "we" are in receipt of your written appeal and stating that "we" are firmly of the

opinion that the reasons you were dismissed for Gross Misconduct are fair and correct. His name is again followed by a reference to his position in Urathon Europe Ltd and Urathon China Ltd.

47. I did not attach a lot of weight to the reference to two Urathon companies after Mr Sims-Hilditch's name on these documents. It is commonplace for work emails to be set up to automatically include a sender's name and position automatically. If the sender has different roles in different organisations, it is not that surprising if the default details inserted by the user's email system are sometimes inaccurate.
48. Some other documents in Mr Naylor's supplementary bundle are not consistent with his claim that Urathon Europe Ltd was the original employer. His document 2 (an email from Rob Taylor at Urathon from September 2021) asserts that Ms Naylor had never been employed by Urathon. His document 6 (a pay slip giving "Anna Sims-Hilditch" as the employer) is not consistent with Urathon being the original employer. And his document 8 (an email from Mr Sims-Hilditch) refers to the first claimant as having been employed by Mrs Sims-Hilditch.
49. I understood from what Mr Roberts told me at the hearing (and confirmed in the respondents' response to the reconsideration application) that, when preparing the hearing bundle for the 7 December hearing, the respondents' legal advisors had assumed that the identity of the claimants' employer did not need to be addressed. That was because the claimants (acting through Mr Naylor) had already conceded that Hildare was the employer at the date of dismissal.
50. On the basis of the documents available and the parties' submissions, it appeared to me on 7 December that it was more likely than not that Mrs Sims-Hilditch, rather than Urathon Europe Limited, was the claimants' employer until 8 September 2020. That is why I referred in my written reasons to her having been the original employer. But I did not see that as a matter that was of direct relevance to the issues at the hearing.
51. I should add that the only candidates put forward by the parties as the original employer were Mrs Sims-Hilditch and Urathon Europe Ltd. There was no suggestion (or any documentary evidence to suggest) that Mr Sims-Hilditch or anyone else might have been the claimants' employer prior to Hildare.

Complaint about my approach to Mr Naylor's supplementary bundle of documents

52. I will deal first with a matter raised by Mr Naylor in his reconsideration application, which is not among the points repeated in his letter of 18 June but may be something he sees as disclosing bias on my part. This is a complaint relating to the fact that the hearing bundle I was supplied with the day before the 7 December hearing was not an agreed bundle and did not include all the documents Mr Naylor wished to put in.
53. For some reason an 18-page supplementary bundle from Mr Naylor was not forwarded to me with the bundle prepared by the respondents. I was unaware of this (and had assumed the main bundle was agreed, as it should have been) until the start of the hearing when I was exploring with the parties whether we all had the same, and the correct, documents. I asked to be sent the missing bundle as soon as possible and the Tribunal clerk arranged for that to happen. The email to me from the Tribunal clerk attaching the missing bundle is timed at 10.08 am.
54. My recollection is that there was a short pause early in the video hearing to enable one of the attendees to connect. As the missing bundle had arrived in my inbox I took the chance to read through the bundle. I am not sure exactly how long I spent doing that but I believe it was more like seven or eight minutes than five.
55. Mr Naylor complains that his supplementary bundle of documents was not supplied to me in advance of the hearing, and that it was unfair that I read "the respondent's documents" in advance, as "his documents" received less attention. He also

complains that his documents did not receive enough attention, in that I only adjourned for 5 minutes at the start of the hearing to read it.

56. As the hearing was limited to 3 hours I was under a duty to manage the timetable to complete the hearing, and make a decision, within that time allocation. For this reason, I decided not to enquire as to why the missing documents were not in the agreed bundle or why they had not been forwarded to me prior to the hearing. Those were side issues, time was short, and it was more important for me to see the supplementary bundle so that we could move onto the issues.
57. The hearing bundle from the respondents included the "pleadings", various procedural orders etc and communications between the parties and/or with the Tribunal. It did not contain much, if anything, in the way of specific documentary evidence. As such, Mr Naylor's description of the bundle as "the respondents' documents" is in my view misleading. And his suggestion that the contents may have been tampered with in some way by the respondents' professional representatives is not backed up with any specific allegations or evidence.
58. I read the hearing bundle I was sent in advance of the hearing to get a feel for the case, the parties' likely positions and the issues for the preliminary hearing. I also read the supplementary bundle shortly after it arrived in my inbox at the start of the hearing. My aim was simply to identify what the documents were and what they said, given that Mr Naylor would have a full opportunity to refer me to anything specific that he considered to be relevant to his explanations and submissions (as he did, as far as I could tell). The time spent was in my view sufficient for that limited purpose, and commensurate with the need to complete the hearing within three hours.
59. It did not occur to me at the time that responding to a not uncommon situation (where documents have not found their way to the hearing judge) in the way I did was inappropriate or unfair to either party. As far as I recall, Mr Naylor did not object to what I did at the time or suggest I should do anything different. If he considers that I made a mistake in handling this particular issue, that is a matter that could be raised on an appeal. But if this complaint is part of his grounds for alleging apparent bias, I should make clear that I do not accept his characterisation of what took place. It was regrettable that his short bundle did not come to me in advance, but I cannot see any basis for thinking that my response to discovering that fact displayed any bias.

Complaint relating to first claimant's requests for information

60. I am not entirely sure whether the third paragraph of Mr Naylor's letter of 18 June (beginning "*To establish the correct name* …") is a complaint about something that Mr Naylor sees as disclosing bias on my part. The paragraph refers to four emails sent prior to the submission of the ET1 forms. Mr Naylor says those emails requested the correct name of the employer and sought to clarify the company structure. He goes on to say the requested information was not supplied, despite the intervention of the Information Commissioner's Office.
61. I note that first numbered paragraph in the letter of 18 June refers to "this evidence" being the subject of an adverse comment from me. That might appear to be a reference to the emails described in paragraph 60 above. However, the comment he complains about (which I address below) was not about those matters.
62. There were some documents in Mr Naylor's supplementary bundle that appeared to relate to those matters, namely documents 10, 11 and 12 (extracts from letters from the first claimant seeking information from Mr Sims Hilditch), document 13 (a letter to the first claimant on Hildare Stud Farm Ltd notepaper from Mr Sims Hilditch dated 6 July 2021), document 14 (letter from the ICO apparently to Hildare regarding a

complaint about a failure to provide data) and document 15 (another letter from the ICO). I note that all but one of these documents are extracts from longer documents. The bundle should have included the full documents, because otherwise the Tribunal and the other party cannot judge whether anything omitted might be relevant.

63. It is clear on their face that documents 10 to 13 relate to the disciplinary process prior to the decision to dismiss. It appears that documents 14 and 15 relate back to documents 10 to 13. However, as far as I can see none of them were relevant to the question whether to strike out the claims. While a failure to provide documents or information might well be relevant to the fairness or otherwise of the disciplinary and appeal processes adopted in the claimants' case, I do not see how any such failure impacted on the issues at the 7 December hearing.
64. As far as I recall, Mr Naylor referred briefly to documents 10 to 15 at the start of the hearing on 7 December but did not specifically rely on an of them in his submissions. In these circumstances, I do not consider that there is anything in the third paragraph of Mr Naylor's letter of 18 June that discloses any bias on my part.

Complaint relating to comment on documents in the supplementary bundle

65. Mr Naylor complains that *"When referring to this evidence, Judge Hogarth remarked, 'I suspect the respondents counsel will see this as a red herring'*. I did say something along those lines although my recollection is that the remark was more like "the respondents' counsel will probably tell me that this is a red herring."
66. As mentioned above, the reference to "this evidence" was not the evidence about requests for information from the respondents (i.e. the documents described in paragraph 62 above). My comment related to Mr Naylor's assertions during the hearing about the identity of the claimants' employer prior to Hildare.
67. Mr Naylor had referred in particular to Document 6 of his supplementary bundle (the first claimant's pay slip for October 2020). As I understood it, the pay slip was seen by Mr Naylor as important, mainly to support his explanation that he was, in his view reasonably, confused prior to presenting the claim form as to who the claimants' employer was. But he also seemed to think the identity of the employer in October 2020 mattered in itself. At the hearing I could not myself see any direct link to the issues before me. The documents he was putting forward to show who the original employer was did not seem to help his case, apart from indicating that there were some contradictory documents in existence.
68. The pay slip is dated 28 October 2020 and names the "company" as "Anna Sims-Hilditch". That indicates that Mrs Sims-Hilditch was the employer on that date. However, other documents suggest that the claimants' employment transferred to Hildare on 8 September 2020 under the TUPE regulations, following a business transfer on that date.
69. I asked Mr Naylor if all the pay slips after October 2020 were in the same name (i.e. naming Anna Sims-Hilditch) and I understood him to reply that they were. If correct, that could have been directly relevant to the question of extending time for the claims against Hildare. However, there were no later pay slips in either bundle. A little later on in the hearing, Mr Roberts informed me that the later pay slips were all in the name of Hildare. He said the October 2020 pay slip was the last one in the name of Anna Sims-Hilditch. He also referred to the concession and correspondence described in paragraph 37 above. He said that because Mr Naylor had previously

accepted that Hildare was the relevant employer, the respondents had not included pay slips or other documents relevant to the employment contract in the bundle. Mr Roberts told me he could provide pay slips for each claimant showing her employer as Hildare Stud Farm Limited.

70. I did not understand Mr Naylor to dispute what Mr Roberts said and I believe Mr Naylor said something along the lines that he meant to refer to bank statements rather than pay slips, when he told me that all the pay slips after October 2020 were in the same name.
71. I was reluctant to pause the hearing to wait for sight of the two pay slips Mr Roberts arranged to send (which duly arrived in my inbox at midday). It appeared to me likely that what Mr Roberts told me, uncontested by Mr Naylor, was true. If there was any mistake, that would soon be apparent and could be considered in due course.
72. Mr Naylor had also put forward documents suggesting that the claimants were employed before Hildare by Urathon Europe Ltd, which I have described above.
73. This was the context in which I said something along the lines that I suspected the point Mr Naylor was pursuing was something counsel for the respondents would probably tell me was a red herring. In my view the meaning was reasonably clear. Mr Roberts did indeed express the view that the pay slip, and the identity of the original employer, was of no relevance to the issues before me. I considered that I understood enough about the pay slip and the other documents Mr Naylor was referring to for the purposes of making my decisions, and I did not think we needed to spend more time on a point of no direct relevance to the question whether time should be extended. I simply wanted to move on, to ensure that Mr Naylor had time to make all the points he wished to make.
74. Mr Naylor also complains that "*This comment*" (that a point he was pursuing was "a red herring") "*was both unqualified and based on supposition, further, Judge Hogarth did not explain the rationale for his comment.*", I do not agree with that characterization. In the face of the information about subsequent pay slips the relevance of the 28 October pay slip was obviously limited. And the identity of the original employer was not itself relevant to the issues at the hearing.
75. I accept with hindsight that the expression "red herring" was not well-chosen and perhaps could have been explained better. But I do not consider that there is anything in the remark that evidences, or could plausibly be taken as indicating, any bias. At the time Mr Naylor had made his point, but I could not see how it helped him, and I was simply anticipating submissions that would inevitably be made by counsel for the respondents (as indeed they were). I did, however, consider all of MMr Naylor's evidence and submissions in reaching my decision to strike out the claims aginst Hildare.

Complaint relating to comment about the reason the 28 October pay slip mentioned Mrs Sims-Hilditch

76. Mr Naylor complains that "*Referring to another item of evidence concerning the naming of the employer on the claimants' payslips, Judge Hogarth remarked, 'I expect the employer probably didn't have time to change them'. This remark is speculative and not based on fact, it is further evidence of bias in support of the respondent's case*". This complaint is closely connected with the previous complaint.
77. My remark was made in relation to document 6 in his bundle (the first claimant's 28 October 2020 pay slip). I did make a comment along the lines stated by Mr Naylor

but do not recollect the exact wording. The remark was made after Mr Naylor had suggested that there was something odd or sinister (in terms of the respondents' position as to who the original employer was) about the fact Anna Sims-Hilditch was still named as the company (i.e. the employer) on the 28 October pay slip, despite the business transfer to Hildare that the respondents said happened on 8 September.

78. It was clear that the reference to Mrs Sims-Hilditch in the October pay slip was wrong, as the "company" named in it should have been "Hildare Stud Farm Ltd". I thought that this was probably an administrative error in picking up the consequences of the change of employer under the TUPE regulations. The practical effects of the TUPE regulations are not easy to understand, and it is not in my view surprising if it took a few weeks for the payroll operator to catch up. Given that the November pay slips did name "Hildare Stud Farm Ltd" as the employer, I remain of the view that administrative error is the most likely explanation for the mistake, if anything turns on it. I do not, however, consider that anything did turn on the point in terms of the issues before me at the 7 December hearing.
79. Beyond making his point about the name on the October payslip forcefully, I do not recall Mr Naylor giving any other specific explanation for the appearance of Mrs Sims-Hilditch's name.
80. I do not consider that the remark complained of discloses any bias on my part – it simply reflected what I thought at the time (and still think) was, on the balance of probabilities, the most likely explanation for what appears to be a minor error that was made a short time after the business transfer on 8 September.

Complaint about my treatment of his assertion that Urathon Limited was the employer prior to Hildare

81. Mr Naylor complains that "*Judge Hogarth also dismissed the claimant's documentary evidence which stated the claimants were employed by Urathon Ltd, again without rationale*." I have already discussed in paragraphs 36 to 51 above the issues about the identity of the claimants' employer. My understanding was that Mr Naylor was asserting that Urathon Europe Ltd was their employer prior to Hildare. That did not appear to me to help his case on extending time that much (beyond demonstrating the existence of some contradictory documents). The question he needed to address was why the claims <u>against Hildare</u> were not made in time.
82. I do not accept Mr Naylor's characterisation that I "dismissed" the documents relating to Urathon being the pre-Hildare employer. I read them and considered what he had to say about them. I did not regard them as sufficient to prove that the claimants were employed by Urathon Europe Ltd (if it mattered), contrary to the assertions of the respondents that Mrs Sims-Hilditch was the original employer.
83. Mr Naylor is clearly of the view that my treatment of the question whether Urathon was the claimants' original employer was wrong. That is a matter that he is free to pursue on an appeal, but in my view there is nothing in the matters raised by this specific complaint that indicates any bias on my part.

Complaint about my view that Mrs Sims Hilditch was the original employer

84. The final complaint made by Mr Naylor in his letter of 18 June 2022 is that *"the judge accepted on face value, the assertion of the respondent's counsel, who stated that the claimants were employed by Mrs Sims Hilditch as a sole trader, no documentary evidence in the form of HMRC / PAYE records were produced or requested in support of this statement."*. This complaint is, essentially, part of the same complaint

as the previous one, because the only names put forward by the parties for the original employer were Urathon Europe Limited and Anna Sims-Hilditch.

85. I do not accept Mr Naylors' characterisation of what happened in relation to Mrs Sims-Hilditch. In the circumstances there was no reason for the respondents to have set out at the hearing to prove that Anna Sims-HIlditch was the original employer; and it is not the function of an employment judge to act as an inquisitor in terms of calling for more evidence. In any event, at the hearing I considered that there was documentary evidence to support both parties' contentions. The evidence was limited (as there must be relevant documents that were not in either bundle) but I considered that evidence, and the parties' submissions, before making my decisions. The documents available to me were not, in my view, conclusive either way. But that is not unusual and, if a decision is needed, the judge has to decide what the facts were on a balance of probabilities. I decided that it was more probable than not that the original employer was Mrs Sims-Hilditch, rather than Urathon. In my view the documents in Mr Naylor's supplementary bundle did not prove that Urathon was the original employer.
86. If Mr Naylor considers that the way I handled this matter was wrong and that that affected my decision to strike out the claims against Hildare, then that is a matter he can pursue on an appeal. I do not consider that the way I approached the matter displayed any bias.

Conclusion on recusal application

87. Mr Naylor ends his letter of 18 June 2023 with the following sentence: "*It is the claimant's opinion that points above constitute apparent bias as defined in the test devised in Porter v Magill.".* In my analysis of the grounds for the recusal application I have considered, and rejected, each of Mr Naylor's specific complaints about matters he says disclosed bias on my part in the way I handled the hearing on 7 December and reached my decisions.
88. I have also considered whether there is any way in which any two or more of the complaints, taken together, might suggest bias on my part. However, I have not identified anything to suggest that any of his complaints, taken together, do suggest any bias on my part.
89. In my view the complaints are without foundation, whether viewed individually or taken together. It follows that the claimants' application for me to recuse myself from further involvement in the case is refused. This means that there is now no impediment to my participation in the reconsideration process, in accordance with Rule 72.

The claimants' reconsideration application: next steps

90. The next step in relation to the reconsideration application is for me to determine whether there should be a hearing. Mr Naylor has expressed the view that the reconsideration application does require a hearing, while the respondents have expressed the view that a hearing is not necessary in the interests of justice and that the application can instead be dealt with on the papers.
91. Under Rule 72(2) the default position is to hold a hearing. Having considered the parties' views, I have concluded that there should be a short hearing. Mr Naylor is a lay person and a hearing would give him the best opportunity to articulate his grounds for asserting that I should exercise my power to vary or revoke my judgments of 8 December 2022. The law limits the use that can properly be made of

that power, and a hearing will ensure that both parties' cases as to the exercise of that power are properly put forward. I have considered the fact that a hearing involves additional legal costs to the respondents, but I do not view that in itself as a sufficient reason to displace the default position under the Rules.

92. Accordingly, I will arrange for a reconsideration hearing, limited to 2 hours, to be listed for **10 a.m**. on **12 October 2023**, to take place before me by video conference. The listing will be the subject of separate Case Management Orders.

Employment Judge Hogarth
Dated: 21 August 2023

Sent to the parties on: 22 September 2023

For the Tribunal Office