Neutral Citation Number: [2025] EAT 61

Case Nos: EA-2023-SCO-000101-DT
EA-2024-SCO-000033-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 7 January 2025

Before:

JUDGE BARRY CLARKE

Between:

DR. CRAIG JOHN BENNOCH

Appellant

- and -

SCOTTISH POWER LTD
SCOTTISH POWER RENEWABLE ENERGY
SCOTTISH POWER UK PLC

Respondents

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Dr Craig John Bennoch, the **Appellant**

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Hearing date: 12 November 2024

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JUDGMENT

Judge Barry Clarke:

1. This judgment follows a hearing held under rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (**EAT Rules**) to consider whether Dr Bennoch's appeal discloses reasonably arguable grounds and should be permitted to proceed to a full hearing before the Employment Appeal Tribunal. The appeal concerns a refusal by the President of Employment Tribunals in Scotland to reconsider an earlier judgment reached by a now-retired judge and members. Unusually for a rule 3(10) hearing, and given the need to understand the complex procedural background (which was not fully apparent from the paperwork before me), I decided to reserve judgment.

Background

2. The background is that, between March 2012 and August 2017, Scottish Power Renewable Energy Ltd employed Dr Bennoch as a senior electrical engineer. When the company terminated his employment, which now happened over seven years ago, it said that its decision to dismiss him was for "some other substantial reason" or, alternatively, for a reason relating to his conduct.

3. Dr Bennoch presented a complaint of unfair dismissal. The hearing of that complaint took place before the Employment Tribunal (ET) in Glasgow over nine days (spread over November 2018 and June 2019), followed by a decision meeting on 31 October 2019. The complaint was heard by a full panel comprising Employment Judge Atack, Mr Boyd and Mr Borowski. The claimant was represented at the hearing by a solicitor, Ms Dalziel, for the first six days of the hearing and by a barrister, Mr John, for the final three days of the hearing. For reasons that will become relevant, I note that, at this time, Ms Dalziel was employed by a specialist firm of employment law solicitors, McGrade & Co. The respondent was represented by Mr Gibson.

4. By a reserved judgment entered in the register on 27 November 2019, the ET dismissed the complaint. The claims against the first respondent and the third respondent (respectively Scottish Power Ltd and Scottish Power UK plc) were dismissed upon their withdrawal, while the claim against

the second respondent (Scottish Power Renewable Energy Ltd) was dismissed on its merits.

5. As the ET did, I will simply refer to the second respondent as the respondent. I will continue to refer to Dr Bennoch as the claimant.

6. I must be blunt: the claimant has never been able to accept the ET's judgment. Five years after the ET found he was not unfairly dismissed, he remains convinced that it was a miscarriage of justice, and he continues to seek ways of restarting his case. He has made numerous requests for reconsideration. This judgment is produced in response to his fifth and sixth appeals to the EAT. His criticisms have become so wide-ranging that it is difficult to disentangle from them the contentions that actually purport to identify an error of law. His repeated correspondence, hundreds of items over several years, has generated more heat than light. It now encompasses allegations of misconduct involving various named members of the judiciary.

7. It is worth a reminder of what the claimant's claim was originally about. The best place to begin is the ET's judgment (although the claimant will doubtless disagree, so scathing is he of its content). In the judgment, the ET narrated various performance reviews that the respondent had conducted with the claimant during his employment, and also a grievance of bullying and harassment that the claimant had brought against his line manager. At paragraph 88 of its judgment, the ET specifically noted the respondent's view that the claimant was unable to accept either his performance reviews or the rejection of his grievance (and his inability to accept an outcome adverse to him has been amply demonstrated in the subsequent years). Eventually, because the claimant kept revisiting these matters, the respondent decided that his ongoing employment was untenable and it dismissed him. It considered that the relationship with him had broken down irretrievably. The ET found that the respondent's decision to dismiss the claimant was fair.

8. There was no single bundle of documents available to me setting out subsequent events. However, as best as I can understand the chronology, it is clear that the claimant appealed the ET's judgment (EA-2020-SCO-000001-SH, previously UKEATPAS/0002/20/BA) and that his appeal was "sifted out" by Mr Justice Linden under rule 3(7) of the **EAT Rules** on the basis that it did not disclose

any reasonably arguable grounds. The claimant sought to review that decision, and he was advised that the proper step was to request an oral hearing under rule 3(10). Following correspondence with the EAT, a rule 3(10) hearing was eventually fixed for 18 May 2021.

9. Separately, the claimant made three applications to the ET for reconsideration. The first was refused by Judge Atack on 17 January 2020 in these terms: "Your application has been refused because the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked. The points made by the claimant are points more suited to an appeal." The second was refused by Judge Atack on 25 February 2020. By the time of the third application, Judge Atack had retired. It was therefore considered by Judge Walker, then the Vice President of Employment Tribunals in Scotland, on 14 April 2021. She refused it.

10. Each refusal to reconsider was the subject of an appeal to the EAT: EA-2021-SCO-000027-SH (previously UKEATPAS/0007/21/SH), EA-2021-SCO-000028-SH (previously UKEATPAS/0008/21/SH) and EA-2021-SCO-000055-SH (previously UKEATPAS/0034/21/SH). The first reconsideration appeal was "sifted out" under rule 3(7) by HHJ Auerbach, the second by Mr Justice Linden, and the third by Mr Justice Choudhury (then President of the EAT).

11. So, by this stage, there were four appeals before the EAT. On 18 May 2021, Lord Fairley conducted a conjoined rule 3(10) hearing in relation to three of them: the appeal against the main judgment and the first two of the three reconsideration appeals. The claimant at that point still retained McGrade & Co as his solicitors and he was represented before the EAT, as he had been in part before the ET, by Mr John. In a reserved judgment dated 21 June 2021, Lord Fairley agreed with the sift judges that the claimant's appeals disclosed no reasonably arguable grounds and he directed that no further action be taken on them. Indeed, he described the ET's judgment as a "model of clarity". Subsequently, by a letter from the EAT sent on 16 July 2021, he refused to review his judgment; and, by letter from the EAT dated 3 August 2021, he refused the claimant permission to appeal.

12. Subsequently, on 28 October 2021, Lord Fairley conducted a rule 3(10) hearing in respect of the fourth appeal; this was the one challenging Judge Walker's refusal of the claimant's third

reconsideration application. I will say a little more about this appeal, since the claimant's application for reconsideration was made on 1 and 9 November 2020, nearly a year after he had received the ET's original judgment. By this application, he sought to adduce evidence that had not been put before the ET during the original hearing. Judge Walker refused his application. This was on the basis that the application had been made significantly outside the period of 14 days stipulated in rule 71 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (**ET Rules**), with no adequate reason given as to why it had been made late or why it would be in the interests of justice to extend time, and with no suggestion that this new evidence had been unavailable to the claimant at an earlier date. It is, of course, well known that finality in litigation serves the interests of justice.

13. The claimant represented himself at the rule 3(10) hearing. Lord Fairley considered that his appeal was without merit and, by a judgment dated 1 November 2021, he directed that no further action be taken in respect of it.

14. There was further correspondence which led Lord Fairley to decline, on several occasions and in response to several applications, to review his judgment. For example, by letter from the EAT sent on 6 December 2021, Lord Fairley emphasised that the review procedure under rule 33 of the **EAT Rules** was not a vehicle for repeatedly re-arguing points that had been unsuccessful. Notwithstanding, Lord Fairley refused several further applications for reviews of his judgment. In one such refusal, dated 11 July 2022, he said this: "Repeated review applications have formed part of a pattern of behaviour by the [claimant] before the Employment Tribunal and the Employment Appeal Tribunal".

15. Separately, the claimant appealed to the Inner House of the Court of Session. Lord Malcolm considered whether permission to appeal should be granted. As the most senior judge to have considered the claimant's case, it is helpful to repeat what he said in his accompanying reasons when, on 29 January 2022, he refused permission:

> "[17] There is an underlying mistake or misconception that permeates almost everything which has been said by way of challenge to the ET's judgment, namely the proposition that it could only properly address the fairness or

otherwise of the dismissal if it adjudicated upon the complaints as to the 2016 grading, the appeal decisions, and the outcome of the bullying and harassment grievance procedure. This error was pointed out by Linden J .. and it formed the main plank of the rule 3(10) decision.

[18] The ET held that the internal procedures had been conducted properly by persons with no agenda against the claimant. The decision-makers were entitled to reach the decisions taken. The claimant was not willing to accept the outcomes nor to engage in any process designed to repair relationships. He refused to participate in the 2017 performance review. The claimant was responsible for the breakdown in trust and confidence in him. Faced with intransigence, in the view of the ET there was nothing further the employer could do. "We considered that the respondent had lost trust and confidence in the claimant and that the working relationship between him and his colleagues had irretrievably broken down" (para 165). Mutual trust and confidence is at the heart of the employment relationship and there is no doubt that its loss can amount to some other substantial reason for dismissal in terms of section 98(1) of the Act.

[19] The claimant was not dismissed because of his performance in 2016 but because of the breakdown in the employment relationship caused by all the factors outlined by the ET. Having correctly identified this as the "some other substantial reason" for the dismissal, the ET's task was not to review his performance in 2016, but to address the statutory test for fairness set out in section 98(4), namely whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal, a matter to be determined in accordance with equity and the substantial merits of the case.

[20] The ET held that before dismissing the claimant the employer had carried out a fair procedure which followed the ACAS Code of Practice. There had been an investigation into the facts. The claimant was informed as to the problem as perceived by the employer, and that he might be dismissed. He was invited to a meeting and advised that he could be accompanied. Having considered what was said at the meeting, the dismissal decision was taken, and he was given an opportunity to appeal …

[21] It is well established that the ET cannot substitute any view of its own on the dismissal for the said reason. Its task is to decide whether the employer's decision to dismiss fell within the range of responses open to a reasonable employer. That is a matter for the specialist tribunal which heard nine days of evidence from the claimant and others. The EAT or a further Court of Appeal cannot simply look at the evidence again and come to its own decision on that question. For the reasons explained by it, particularly at paras 171-180, the ET held that in all the circumstances the dismissal was fair. It was within the range of reasonable responses. Even if there had been an alternative role available

for the claimant it would not have been appropriate to offer it to him. The tribunal did not ignore the claimant's complaints about the grading and other decisions. However for a finding of a fair dismissal for the stated reason it was more than enough for it to be satisfied that his manager and others were free of malice or bad faith and that satisfactory procedures had been followed. Establishing that the employer was correct in respect of the grading score was not a pre-condition of a reasonable dismissal.

[22] Once the proper nature and scope of the issue before the ET is appreciated the criticisms based on a failure to address elements of the claimant's case; deficient or inadequate reasoning; or omissions and errors of fact, largely fall away. The tribunal did not have to "grapple" with the substance and merits of the claimant's challenges to the grading and subsequent internal appeals and reviews. The ET had only to deal with and make findings in respect of matters relevant to the statutory criteria, namely, what was the reason for the dismissal, and if it was for some other substantial reason, was dismissal based on it fair? As Linden J observed, the tribunal was not obliged to explore every highway and byway of evidence and resolve every factual dispute.

[23] Seen in this context it is apparent that the tribunal made more than sufficient findings in fact and in law. Its reasoning is clear, coherent and allows the parties and others to understand the basis for the outcome. There is no need or justification for asking the tribunal to provide any further explanation. There is no proper basis for any assertion that any of the key findings were impermissible. It is plain that the claimant disagrees with many of them and would wish different and additional findings and conclusions to be reached. However an appeal to the EAT is not an opportunity to open up the evidence and the merits of a case and re-argue the contested issues in the hope of a more favourable outcome. I am satisfied that that is really what the claimant is trying to do. Furthermore he seeks to elevate his disagreements into reviewable errors of law by labelling as perverse or unreasonable anything with which he is unhappy.

[24] As to the reconsideration appeals I agree with Lord Fairley that the first adds nothing to the main appeal and that the second was correctly dealt with by Linden J. While there is no proper basis for challenging the tribunal's decision on the matter, it can be noted that even if the view had been taken that the claimant was not a specialist and an alternative role was available, this would have made no difference to the outcome.

[25] In a post-application letter the claimant drew attention to a decision in another case where reasons were provided for the refusal of a reconsideration request. The tribunal judge drew attention to the principle of finality and that such requests do not provide an opportunity to re-litigate matters. I do not consider that the judgment demonstrates anything of assistance to the claimant.

> As in that case, here the ET did not miss something of importance to its determination."

16. That appears to have concluded the claimant's first, second, third and fourth appeals. I will not set out the detail, but he continued to correspond about his claim during 2022 and 2023. His emails to the ET, the EAT and/or the Inner House were usually copied to a host of court and tribunal jurisdictions and legal organisations across the UK, journalists, the First Minister, and a variety of MPs and MSPs. Again, I will be blunt: the claimant's correspondence has become increasingly florid, extending far beyond his ongoing critique of the ET's original judgment. His recent contentions include that the judges dealing with his case, from Judge Atack to Lord Malcolm and most of those in between, have acted maliciously. In one email, he accused them of abusing their office to make his case "disappear". He has similarly accused them of misconduct in public office. In material written in 2024 the claimant said: "None of these individuals should have any place in the legal system in a functioning democratic society and certainly have no place in the judiciary or as a tribunal judge. The sooner they are removed from office the better that will be for society as a whole."

17. The main outcome sought by the claimant, as he has regularly articulated, is that he can take his case "back to the beginning", presupposing that if only he could run it again he would succeed. The claimant's modus operandi appears to be to seek to engage as many people as possible in correspondence about his experience, or about the legal procedures that operate in the EAT and the Inner House, inviting replies that enable him to keep his case alive a little longer and/or which prompt a judicial decision that is then amenable to appeal, feeding his hope that the ET's judgment will eventually be annulled. One of his strategies is to level a proposition to the recipients of his correspondence – for example, that they had a conflict of interest in dealing with his case – and then to suggest that the lack of a denial is itself probative of that contention.

The 2023 reconsideration application

18. The above background provides essential context to the claimant's latest reconsideration

application to the ET, which has in turn spawned the two present appeals.

19. On 10 October 2023, the claimant wrote to the ET applying again for reconsideration of both the original judgment promulgated on 27 November 2019 and Judge Atack's first refusal to reconsider dated 17 January 2020. Pausing there, this was now nearly four years after the judgment and by which time all three members of the original ET panel had retired. In his application, the claimant said that the ET's judgment did not properly analyse his case and was "fundamentally flawed", while Judge Atack's short refusal of his first reconsideration application was "completely unacceptable", and in combination these decisions "cannot be described in any shape or form as appropriate handling of an ET case". The brevity of Judge Atack's response to the claimant's first reconsideration application, which I set out in full above, was said to be in stark contrast to the first-instance decision issued by a different ET in the case of **Gourlay v West Dunbartonshire Council** (4106122/2015).

20. This sort of criticism was no different to the claimant's previous contentions about these decisions, and which had been considered by the EAT previously. However, what informed his latest application was that he now believed there to have been a clear conflict of interest. He articulated that conflict in his application by reference to the following:

> 20.1 The only adequate or meaningful explanation for the flawed nature of the judgment in his case was that the panel was biased.
>
> 20.2 Judge Atack had been an employee of the respondent and "did not deny" that he had a conflict of interest.
>
> 20.3 On 27 November 2023, when researching the background of the panel members, he had obtained an article dated 22 August 2008 from the Jewish Chronicle. That article contained a quote from Mr Giles Woolfson. Mr Woolfson is a director at McGrade & Co, the firm which provided him with legal representation earlier in his case (although the solicitor thereby engaged to represent him at the hearing was Ms Dalziel).

The article identified Mr Woolfson, in the claimant's words, as a "prominent member of the Glasgow Reform Synagogue".

20.4 Mr Woolfson apparently told the claimant on 3 October 2023 that he knew Mr Borowski, one of the two non-legal members. Mr Borowski is described as a "prominent member of the Giffnock Newton Mearns Synagogue (the Orthodox congregation which is based nearby)". The claimant says that there are "contentious issues between the two congregations".

20.5 The claimant inferred that Mr Woolfson and Mr Borowski are "well known to each other" and he criticised them for failing to make this known to the parties at the start of the hearing.

20.6 Given that Judge Atack was previously an employee of the respondent, as the claimant puts it, this meant that two of the three panel members had "confirmed conflicts of interest". To the claimant, such a conflict is the only plausible explanation for why "Mr Borowski decided to join in with Judge Atack in attempting to make the claimant's side of the case simply disappear".

20.7 Further, that "it has to be assumed that Mr Boyd also has a conflict of interest as it has not been denied by the ET".

20.8 In this context it is "of note that Judge Atack, Mr Boyd and Mr Borowski have stopped conducting ET hearings".

20.9 Consequently, "the most sensible approach will be to take the case back to the beginning".

20.10 He sought the recovery of his fees and compensation for the "maliciousness" of Judge Atack, Mr Boyd, Mr Borowski, Mr Justice Linden, Lord Fairley and Lord Malcolm.

21. The claimant's application was considered by Judge Walker, now the President of

Employment Tribunals in Scotland, on 11 October 2023, having regard to Judge Atack's retirement.

It is helpful to set out her decision in full:

> "I will deal first with Dr Bennoch's assertion that because the Employment Tribunal did not deny that there was a conflict of interest therefore it exists. That is not sustainable. Dr Bennoch has written many times to the Employment Tribunal, to the President of the Employment Tribunal and to numerous other people. Often the Employment Tribunal is simply copied in to other correspondence. The fact that no specific response was made to one of a number of allegations he made in voluminous correspondence does not mean it is accepted. For the avoidance of doubt it is not accepted.
>
> *Basis of the application for reconsideration*
>
> The basis of this latest application is that Dr Bennoch says he has recently discovered that Mr Borowski, one of the members, knew Mr Giles Woolfson. Mr Woolfson was a solicitor (Legal Director) employed by McGrade & Co, the firm that represented Dr Bennoch in his case. Mr Woolfson did not represent Dr Bennoch at the hearing. That was undertaken by Ms Dalziel of McGrade & Co and Mr John of counsel . However, Dr Bennoch says that Mr Woolfson was involved in his case. I do not know if that is correct but accept what Dr Bennoch says about that.
>
> Dr Bennoch says that he has found an article from the Jewish Chronicle in 2008 that he says identifies Mr Woolfson as a prominent member of the Glasgow Reform Synagogue also based in Newton Mearns. Dr Bennoch states that Ms Borowski is a prominent member of the Giffnock and Newton Mearns Synagogue (the Orthodox congregation which is based nearby). He does not say how he knows that but I take it he has found that by undertaking internet research. I have no reason to doubt what he says.
>
> Mr Bennoch submits that the fact that Mr Woolfson and Mr Borowski are "well known to each other" would be a conflict of interest that should have been disclosed at the time of the hearing. Further he takes from the article in the Jewish Chronicle that there are some contentious issues between the two congregations. Mr Bennoch says that Mr Woolfson has confirmed that he knows Mr Borowski as they are both members of the Jewish community.
>
> *Should time be extended under rule 5*
>
> The discretion under rule 5 to extend time should be exercised in accordance with the overriding objective which is to deal with cases "fairly and justly". This includes , so far as practicable, avoiding delay and saving expense. I do not consider it would be just to extend time to consider this application.

Finality of litigation is an important principle. The respondent is entitled to consider the matter concluded. It is not fair and just to reopen a decision so long after it was made on the basis of speculation from some internet research. The only new "fact" that Dr Bennoch relies on is that Mr Borowski knew Mr Woolfson as they are both members of the Jewish community. The remainder of the application is based on Dr Bennoch's speculation that there may be animosity between them. That is not sufficient to outweigh the importance of finality. Reconsideration is not a vehicle to relitigate the case.

No reasonable prospects

In case I am wrong about that, I have considered the application under rule 72(1) and I would have concluded that there was no reasonable prospect of the original decision being varied or revoked.

The test for apparent bias, requiring recusal, is set out in Porter v Magill [2002] 2 AC 357 . It is whether the "fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased'.

Further guidance is given in the Guide to Judicial Conduct 2023 as follows:

> "The question is not whether the judicial office holder would in fact be biased (which would, of course, require recusal). Judicial office holders must recuse themselves from any case where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that they would be biased. This hypothetical observer is taken to know that judges take an oath to administer justice without fear or favour, but also to know that the taking of the oath, by itself, is not sufficient guarantee to exclude all legitimate doubt."
>
> The Guide to Judicial Conduct gives further guidance on particular situations while recognising that each situation must be assessed on its facts. So, for example, "Friendship or past professional association with counsel or solicitor acting for a party is not generally to be regarded as a sufficient reason for disqualification." "Friendship with, or personal animosity towards a party is also a compelling reason for disqualification. Friendship may be distinguished from acquaintanceship which may or may not be a sufficient reason for disqualification, depending on the nature and extent of such acquaintanceship".

Dr Bennoch's position, taken at its highest, is that Mr Borowski knew Mr Woolfson and they were members of different synagogues who differed on

theological matters. I haven't seen Mr Woolfson's response but Dr Bennoch reports that to be that Mr Woolfson confirmed that he knows Mr Borowski as they are both members of the Jewish community. This is not confirmation that he knows him "well" as Dr Bennoch suggests or that there is some animosity between them as Dr Bennoch infers, simply that their paths have crossed as members of the same faith community.

It may well be that if Mr Woolfson had appeared to represent the claimant that the acquaintance with Mr Borowski would have been disclosed to the parties. I do not consider it would have been necessary for Mr Borowski to recuse because of the simple fact of knowing Mr Woolfson as a member of the Jewish community but such matters are often disclosed at the start of a hearing for full transparency (as happened with Mr Atack). However, there is nothing to suggest that Mr Borowski was aware that Mr Woolson had any involvement in Dr Bennoch's case apart from, perhaps, knowledge that Mr Woolfson was a solicitor with the firm that was representing Dr Bennoch.

I do not consider that a fair minded and informed observer having considered the facts (even taken at their highest in Dr Bennoch's submission) would have concluded there was a real possibility that Mr Borowski was biased against Mr Woolfson because they had some theological differences and therefore would be biased against Dr Bennoch by association. This is fanciful.

A potential conflict relating to Judge Atack was properly disclosed and resolved at the time, the claimant having the benefit of representation by counsel. That cannot be revisited now.

I fully appreciate Dr Bennoch is unhappy with the outcome of his case and he also challenges the way his case was dealt with on appeal. However, I do not consider it would be just to extend the time limit for an application for reconsideration. Even if I was to extend time, I would have refused the application under section 72(1) as I consider there is no reasonable prospect of the original decision being varied or revoked.

Gourlay

I take this opportunity to address a matter that Dr Bennoch has raised repeatedly. He refers to an unrelated case of Gourlay. He has found the judgment relating to a reconsideration application in that case online. He complains that an application for reconsideration in Gourlay was considered at a hearing and generated a lengthy judgment. He concludes from that that his own application for reconsideration was not dealt with properly. This is not correct.

Rule 72(1) of the Employment Tribunal Rules of Procedure 2013 provides for

> an initial assessment to be made of such applications by the judge who issued the original judgment. If the judge considers there is no reasonable prospect of the original decision being varied or revoked, that is the end of the application. That decision would be intimated in a short letter and would not be placed on the judgment register. Otherwise the application proceeds to consideration in accordance with rule 72. That will usually, but not always, involve a hearing and the resulting judgment will be placed on the judgment register.
>
> In Dr Bennoch's case, his first application for reconsideration was refused at the initial sift stage . This does not require lengthy reasons, not least because the basis of the application often forms the basis of a subsequent appeal. In Gourlay, however, it can be seen from paragraph 12 that the judge considered that the application for reconsideration might have some merit and so he allowed it to proceed beyond the sift stage. The full panel then considered the application at a hearing in accordance with rule 72. There is therefore no comparison between the reasons that were issued for the decisions on the reconsideration applications in the different cases."

22. On 12 October 2023, the claimant sought a reconsideration of Judge Walker's refusal as summarised above. He made the following points:

22.1 Judge Walker had "glossed over" the issue of judicial misconduct rising from the past association between Mr Woolfson and Mr Borowski.

22.2 Judge Walker had dealt inadequately with his concerns that Judge Atack had previously been employed by the respondent, which had been "sprung on him" on the first day of the ET hearing.

22.3 There were more than merely theological differences between the two congregations.

22.4 It was unlikely that Mr Borowski would not have known of Mr Woolfson's seniority within the law firm representing him.

22.5 There was no reason why Judge Walker could not have contacted Mr Borowski or Judge Atack in retirement to probe them about their previous associations and, indeed, to probe Mr Boyd about whether he had a similar conflict of interest.

22.6 Judge Walker should have looked afresh at the ET's original judgment. Had she done so, it would have been "obvious" to her it was the product of an ET panel that was not impartial.

22.7 He responded on the Gourlay point, contending: "The reason why Judge Atack did not allow the reconsideration request was as we all know simply because he could not back up his ET judgment".

22.8 He described his own case as being in "legal limbo", on the basis that Lord Malcolm (as a single judge of the Inner House) had not been authorised by the Scottish Parliament to perform a sift of an application for leave to appeal.

22.9 He accused Judge Walker of being reluctant to ensure that his case was dealt with properly, in order to avoid embarrassment to EJ Atack, Mr Boyd and Mr Borowski.

23. By letter dated 18 October 2023, Judge Walker directed that the ET reply to the claimant as follows (again, I set it out in full):

> "Judge Walker notes that your application is entitled "reconsideration request" and is made under rule 71. However, the decision to which the application relates is the decision issued by Judge Walker on 11 October 2023 to refuse to extend time under rule 5 to allow you to submit an application for reconsideration. Such a decision is not a "judgment" in terms of rule 1 and so the reconsideration provisions of rules 70-72 do not apply. It is a "case management order".
>
> Rule 29 provides that a case management order may be varied, suspended or set aside where that is "necessary in the interests of justice". In truth, although the process is different under the different rules, the essential test is the same.
>
> Case law also makes it clear that the phrase "necessary in the interests of justice" should be interpreted narrowly. A case management order should not be varied unless there has been a material change of circumstances since the original decision was made or there are some other exceptional circumstances. See for example Goldman Sachs Services Ltd v Montali 2002 ICR 1251 and Serco Ltd v Wells 2016 ICR 768.
>
> While it is clear that you disagree with Judge Walker's decision, she does not consider that there has been any material change in circumstances or other

> exceptional circumstance that would make it necessary in the interests of justice for her decision to be revisited.
>
> The application is therefore refused."

The fifth appeal: grounds

24. I now turn in the narrative to the claimant's fifth appeal in this case, submitted on 22 November 2023, and which concerns Judge Walker's reconsideration decision dated 11 October 2023. This appeal bears the reference EA-2023-SCO-000101-DT. His grounds of appeal are as follows.

25. By the first ground, the claimant contends that Judge Walker failed to engage with the issues he had raised. He describes her analysis as based on a "strange reinterpretation" of the contention he put before the ET in his application on 10 October 2023. Put simply, he says that his submission "remains to be considered and that is a valid ground of appeal in itself", and that the judge responded by reference to points he had not made, for example in respect of the Guide to Judicial Conduct. He largely repeats the points made in his letter to the ET dated 12 October 2023.

26. By the second ground, the claimant alleges that Judge Walker's decision was perverse, in that "no other reasonable tribunal would ignore the fundamental details of the case presented in the reconsideration request made to the ET on 10 October 2023 and write up the decision of 11 October 2023 upon a strange reinterpretation of what was submitted", which he says is "intrinsically linked" to his first ground.

27. By the third ground, the claimant alternatively alleges that Judge Walker's decision was inadequately reasoned. An example of this lack of reasoning, he says, is that she "simply decides to throw out the [congregation] animosity issue by stating that this is not a suitable reason for extending time".

28. These three grounds of appeal say much the same thing. By a decision communicated on 5 January 2024, Sarah Crowther KC, sitting as a Deputy Judge of the High Court, sifted out the claimant's fifth appeal on the basis that it disclosed no reasonably arguable grounds. On 1 February

2024, as is his right, the claimant requested an oral hearing under rule 3(10) of the **EAT Rules**. Accompanying his application for a rule 3(10) hearing was a nine-page critique of Judge Crowther's decision, commenting that her opinion was "just a regurgitation of comments made by previous judges and not actually anything to do with the matters raised in the notice of appeal". His comments include an observation that Judge Crowther "has simply added her name to the list of judges that should be removed from office".

The claimant's 2024 request for a certificate of correction

29. On 21 March 2024, the claimant emailed the ET (among other recipients), purporting to identify "the correct case law" that should have been applied to his case. Then, relying on rule 69 of the **ET Rules**, he invited the ET to "correct any clerical mistake or other accidental slip or omission" by producing a replacement judgment that better represented his "side of the case".

30. In this regard, his focus was on paragraph 150 of the ET's original judgment. I will briefly explain what this is, or appears to be, about. At paragraphs 117 to 135 of its judgment, the ET summarised the respondent's submissions; this included, at paragraph 135, a list of eight case law authorities to which its representative, Mr Gibson, had apparently referred: **Coleman v. Magnet Joinery Ltd**, **BHS Ltd v. Burchell**, **Timex Corporation v. Thomson**, **Iceland Frozen Foods Ltd v. Jones**, **Polkey v AE Dayton Services Ltd**, **Port of London Authority v. Payne**, **Boys and Girls Welfare Society v. McDonald**, **Foley v. Post Office**, and **HSBC Bank plc v. Madden**. They are all cases, it must be said, that will be familiar to employment lawyers. Then, at paragraphs 136 to 150 of its judgment, the ET summarised the claimant's submissions as articulated by his barrister, Mr John, and said this at paragraph 150: "Mr John referred to the same cases as had Mr Gibson in relation to the merits of the case".

31. The claimant took offence at this. He said that Mr John referred the ET to a different list: **UCATT v. Brain**, **Redbridge LBC v. Fishman**, **BHS Ltd v. Burchell**, and **Lund v. St Edmund's School Canterbury** (again, all familiar cases). Even assuming this was correct, the claimant

contended that this omission revealed the fundamental flaws of the ET's judgment in a new light. It required correction. Making a leap of logic, he suggested that this correction would "obviously … change the substantive decision in the case", leading to an outcome favourable to him.

32. The claimant followed this request with a further email attaching a copy of an article by a barrister, Ms Urquhart, which addresses the judgment of HHJ Auerbach in **Reverend J G Hargreaves v Evolve Housing + Support** [2022] EAT 122. That case concerns the issue of when time for an appeal begins to run if the ET has sent out a corrected judgment under rule 69, the claimant's point being that a corrected judgment, if still against him, could trigger a fresh opportunity for him to appeal (although I note that this contention is actually contrary to what HHJ Auerbach decided in the **Hargreaves** case).

33. The ET sent a reply on 28 March 2024 in these terms:

> "Your request for a certificate of correction under rule 69 has been referred to the President, Judge Walker. This is a procedure by which a Judge can correct clerical errors or accidental slips in a judgment. The change you suggest is not an obvious clerical error or accidental slip. The request is refused."

34. The email was resent on 2 April 2024 in identical terms save for providing the correct case number.

The sixth appeal: grounds

35. On 9 May 2024, the appellant submitted his sixth appeal, which concerns the above refusal to issue a replacement judgment by means of a certificate of correction.

36. By the first ground, the claimant contends that Judge Walker gave insufficient reasons; as he puts it, it is "unclear if Judge Walker understood what paragraph 150 should look like in terms of case law (despite this information being provided to the ET) … [her] decision appears to be indicating that she would have corrected the issue with the ET judgment if it was something that was done accidently". Incidentally, the claimant does not specify what difference these four cases would have made (notwithstanding that one of them was actually on the respondent's list).

37. By the second ground, the claimant contends that Judge Walker's decision is perverse. His argument is largely the same as the first ground, save that he adds that "the decision not to resolve matters with paragraph 150 of the ET judgment is perverse as there is no suitable reason given by the ET for not fixing the issue".

38. By a decision communicated on 2 July 2024, Judge Stout sifted out the claimant's sixth appeal on the basis that it disclosed no reasonably arguable grounds and, further, was an abuse of process as it simply rehashed points that had already been ventilated on appeal. On 30 July 2024, as is his right, the claimant requested an oral hearing under rule 3(10) of the **EAT Rules**. Again, his application contained a detailed critique of Judge Stout's decision, focusing on her refusal to "even accept that paragraph 150 is wrong", with the implication that it "cannot be changed" being a "ridiculous proposition". The claimant stated that it is "not [his] fault that malicious judges have been intent on keeping his side of the case hidden".

Miscellaneous

39. For completeness, I will add that, prior to this rule 3(10) hearing, the claimant engaged in extensive correspondence with the EAT by which he sought an order delaying these proceedings. Part of his request was to enable him first to resolve the issue of whether a single judge of the Inner House was lawfully authorised to refuse leave to appeal under a sift procedure. Additionally, he sought a "case management decision" by which the EAT (or, more precisely, me as the listed judge) would order Judge Atack, Mr Boyd and Mr Borowski to answer questions about their conflict of interest, indicating he might decline to attend a hearing in the absence of such answers. In any event, I refused the application; the rule 3(10) hearing proceeded and the claimant did attend.

Discussion and conclusions

40. I began the hearing by explaining to the claimant the limits of my role under rule 3(10): I was not there to rehear his ET claim, or to rehear the appeals that had been dismissed previously by Lord

Fairley, or to rehear his latest reconsideration application. Instead it was my role to consider whether his fifth and sixth appeals had reasonably arguable grounds such that they should be permitted to proceed to a full hearing. To that extent, our focus needed to be exclusively upon Judge Walker's decisions dated 11 October 2023 and 28 March 2024.

41. In repeating this observation in this judgment, I immediately recognise that the claimant will likely say that I have declined to investigate his case in the way he wishes, going back to the fault lines he perceives to run through the bedrock of the ET's original judgment, and even to the extent of believing that I wish to "hide" his side of the case. But the plain fact is that the appellate jurisdiction of the EAT is limited to considering questions of law arising from ET decisions (see section 21(1) of the **Employment Tribunals Act 1996**) and there are only two such decisions presently under challenge.

42. There were some points of context I wished to explore with the claimant. I asked him what he meant by Judge Atack being an employee of the respondent, given that this had informed his view that two out of three of the panel members were conflicted. He confirmed that he had no information about Judge Atack from publicly-available sources and that he based his belief on what the judge had disclosed to the parties at the outset of the hearing in 2018. As the claimant appears incapable of objective detachment from his case, I am unpersuaded that the judge spoke in terms of being one of the respondent's employees. Far more likely is that he said that, when in practice as a lawyer, he had previously been instructed to provide them with legal advice. I make this observation simply to explain why I have not taken at face value the claimant's assertion that the judge was one of the respondent's employees, which is in danger of being elevated through repetition to the status of a fact. I can readily appreciate why, in the ears of a non-lawyer, such a disclosure might sound as if Judge Atack had "worked for" the respondent. However, the claimant had the benefit of representation from an experienced and specialist employment lawyer, and both parties agreed through their representatives that the panel could continue as composed. That being so, I also do not accept the claimant's contention that this means Mr Borowski's conflict, such as it might be, thereby

creates a tainted majority.

43. I allowed the claimant time to speak of his frustrations with the ET's original judgment, but we soon returned, as we needed to do, to that alleged conflict. The claimant inferred that Mr Borowski took against his side of the case because of disputes existing between the two congregations. One of them had Mr Woolfson as a spokesman; he was co-chairman of Glasgow's Reform community as well as being a director of the law firm representing him. The claimant showed me a copy of the article from Jewish Chronicle dated 22 August 2008. While I accept it shows a difference of views between different parts of a faith community, I fail to see how it can properly form the basis for the suggestion – deeply insulting to both Mr Woolfson and Mr Borowski – that the claimant's case would suffer by association because of that dispute.

44. The claimant's allegation about conflict was explicitly speculative but it emerged in three layers: the first layer was that the ET's judgment was so fundamentally flawed that there must be an explanation beyond mere incompetence for its manifest failings; the second layer was that those failings must be deliberate and can only have resulted from the panel being biased against him; and the third layer was that, insofar as Mr Borowski was concerned, his willingness to go along with Judge Atack's flawed approach must have reflected his antipathy, rooted in religious disagreement, towards a person working in a senior position for the law firm representing him (put simply, the claimant's case was a proxy for that religious disagreement and he suffered by association). At one point, after a long account of why he perceived people wished to attain judicial office (in which he hinted, without any evidence, at "one-upmanship" between certain indivisuals over who is appointed to judicial office), the claimant speculated that perhaps Mr Borowski and Mr Woolfson were friendly, or perhaps they (in his words) "had beef" – as he then put it, "I just don't know". He then reverted to the criticism that Mr Borowski should have disclosed the relationship at the start of the hearing, even though Mr Borowski would only have seen that the claimant was represented by Ms Dalziel.

45. I have set out the points above to demonstrate that the claimant's submissions at the rule 3(10) hearing largely repeated the points he had made in his application for reconsideration (and, ultimately,

his criticisms of the ET's original judgment) rather than identifying any actual errors of law in Judge Walker's decision. The claimant has attached labels to her decision – that it was insufficiently reasoned and/or perverse and/or did not engage properly with his application – but these labels are simply different ways of saying the same thing: that he does not agree with her decision. That being so, in my judgment, Judge Walker's refusal to reconsider cannot be characterised as bearing any of those labels. It plainly engages with his application; it is plainly sufficiently reasoned; and it is plainly not perverse. On the last point, Judge Walker had a wide discretion to decide whether to extend time for an application for reconsideration made nearly four years after the judgment and she permissibly declined to do so, on the basis that speculation as to possible animosity between Mr Woolfson and Mr Borowski was insufficient to outweigh the importance principle of finality in litigation. Far from being perverse, I cannot see how any other conclusion was reasonably open to her. She was not, as the claimant characterises it, "throwing out" the issue of congregational animosity without any analysis; instead, she was weighing it in the balance against the finality principle when deciding if time should be extended.

46. Even then, Judge Walker considered the matter in the alternative on its substantive merits, and she permissibly concluded that the application was devoid of merit. In doing so, she properly identified the test for actual or perceived bias that may necessitate recusal (**Porter v. Magill** [2002] 2 AC 357); she took the claimant's contention at its reasonable highest (namely, that the two individuals knew each other and their congregations had theological differences); and she permissibly had regard to the expectations on judicial behaviour set out in the publicly-available Guide to Judicial Conduct. That approach discloses no reasonably arguable error of law and her alternative conclusion cannot be impugned.

47. I can deal briefly with the sixth appeal. It is totally without merit. The issue for this appeal is not, as the claimant puts it, whether paragraph 150 is wrong in stating that the case law authorities relied upon by the claimant were the same case law authorities as relied upon by the respondent. The original ET judgment has already been the subject of an appellate process that has concluded; the

sixth appeal is not a vehicle for re-opening it. Instead, the issue is whether it was an error of law for Judge Walker to refuse an application by the claimant by which rule 69 of the ET rules could be used in the manner for which he contended.

48. As I have already noted, the claimant had been clear in his desire that this amendment should "change the substantive decision in the case". The so-called "slip rule" is not a mechanism for a party to attack a judgment when the processes of reconsideration and appeal have not borne fruit. As Judge Stout explained in her sift decision, the phrase "clerical mistake or other accidental slip or omission" contains ordinary English words, and it should have been obvious to the claimant that the change he requested did not fall into these categories.

49. At paragraph 23 of Secretary of State for the **Home Department v. Devani** [2020] EWCA Civ 612, Underhill LJ said this about the "slip rule" that operated in the Immigration and Asylum Chamber of the First-tier Tribunal:

> "The essential distinction to bear in mind in considering the application of the slip rule, in any of its legislative formulations, is between the case where the order in question does not express what the Court actually intended at the moment of promulgation and the case where it does express what the Court intended at the time but it subsequently appreciates that it should have intended something different: see, most recently, para. 18 of my judgment in AS (Afghanistan) v. Secretary of State for the Home Department [2019] EWCA Civ 208, [2019] 1 WLR 3065 (p. 3071C). As I say there, how the distinction applies in a particular case may not always be straightforward, but the concept is clear. The proposition which the Upper Tribunal drew from the case to which it referred and from the White Book commentary, namely that the slip rule "cannot be used to change the substance of a judgment or order", is perfectly apt as a reference to the second of the two classes of case that I have mentioned; but it appears from the UT's actual decision that it understood it to mean that the slip rule could not be used in a case where the correction would produce a decision with the opposite effect to that promulgated. With all respect, that is simply wrong. In the case of a simple failure of expression – most obviously a straightforward slip of the pen – the error can and should be corrected even if it alters the outcome (as initially expressed) by 180°."

50. The claimant's case does not concern a simple failure of expression or a slip of the pen. Instead

he seeks to reverse the effect of the judgment because it expressed a conclusion with which he disagrees, not because (as in **Devani**) the judge expressed a conclusion that the judge did not intend to express. In this context, the article relied upon by the claimant is irrelevant. It has no bearing on the claimant's position that, in the EAT's judgment in **Hargreaves**, HHJ Auerbach extended time for an appeal as a result of conflicting messages in ET communications about when time started to run. That does not create the expansionist role for rule 69 for which the claimant now contends. That being so, the decision that Judge Walker reached was properly open to her. It cannot be described as either insufficiently reasoned or perverse. It discloses no arguable error of law.

51. Consequently, no further action will be taken in respect of either the fifth or sixth appeals.

52. It is obvious that the claimant disagrees fundamentally with the ET's original judgment. His refusal to accept the outcome, while apparently sincere, is misguided. This is most clearly demonstrated by the immoderate tone of his correspondence and the baseless allegations he levels at those judges who have dealt with his case. His continued attempts to reverse that judgment have become an abuse of process and a waste of the limited resources of the EAT.