Neutral Citation Number: [2025] EAT 118

Case No: EA-2023-001019-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 July 2025

Before :

JUDGE STOUT
MR NICK AZIZ
MR STEVE TORRANCE

- -

Between :

MR HAFEEZ AHMED

Appellant

- and –

DEPARTMENT FOR WORK AND PENSIONS **Respondent**

- -
- -

The Appellant appeared as a Litigant in Person
Mr D TINKLER, Counsel (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 15 July 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

An appearance of bias on the part of two lay members of an Employment Tribunal panel had arisen from a combination of: (i) comments made by one of the lay members about the claimant's behaviour in response to a previous appeal to the EAT by the claimant; and, (ii) the subsequent recusal of the Employment Judge who had chaired the panel for reasons connected with the claimant's behaviour at a subsequent case management hearing. Although in the claimant's previous EAT appeal permission to appeal had been refused in relation to an allegation of bias based (in part) on the lay member's comments had been refused, the claimant was not prevented by the doctrine of issue estoppel from relying on those same comments in combination with the Employment Judge's subsequent recusal. The remitted hearing following the claimant's successful first appeal to the EAT should accordingly have been listed before a fresh Employment Tribunal panel.

JUDGE STOUT, MR NICK AZIZ, & MR STEVE TORRANCE:

Introduction

1. This is the unanimous judgment of the Employment Appeal Tribunal, given orally at the conclusion of the hearing in this matter.

2. The appellant was the claimant below and we will refer to him as such. He appeals against the case management order made by Regional Employment Judge (REJ) Findlay at a hearing on 28 July 2023 with written reasons sent to the parties on 7 August 2023. The sole ground of appeal is concerned with bias, or apparent bias. The allegation arises in the following circumstances.

Background

3. The claimant was employed as a work coach at the respondent's Washwood Heath Jobcentre. By a claim form submitted on 13 January 2018 he brought claims for failure to make reasonable adjustments, indirect discrimination, discrimination arising from disability and victimisation against the respondent. Those claims were heard by an Employment Tribunal comprising Employment Judge (EJ) Butler and members, Mrs Fox and Mr Greatorex, at a hearing on 24-28 June 2019. His claims were dismissed in a reserved judgment sent to the parties on 15 August 2019.

4. In previous proceedings before the Employment Appeal Tribunal, the claimant appealed against that judgment. His grounds of appeal included an allegation of bias. This was ground 20 in his grounds of appeal in that case. The allegations of bias made there focused on the conduct of the employment judge at the hearing and on what the tribunal had said about the claimant and other witnesses in the judgment. HHJ Auerbach granted permission on some of the grounds and listed

the other grounds, including the bias ground, for consideration at a preliminary hearing.

5. He directed in advance of that hearing that the claimant should set out his full allegations of bias in an affidavit, which he did, and also that the employment judge and members should respond, which they did. Their comments are in the bundle before us. For present purposes we need only set out the comments of Mrs Fox on which the claimant now relies. She provided two sets of comments, apparently by way of email to the REJ, but which appear in our bundle as follows:-

> **Ilona Fox, first reply 15th February 2020**
>
> Have managed to find my notes on this case (heard June 27th 2019)
>
> My comment as follows:
>
> We found the claimant to be a very difficult and thoroughly unpleasant individual. Over the course of the five day hearing he demonstrated an aggressive and confrontational attitude, particularly when cross examining witnesses for the respondent. He had to be warned by the Judge about his behaviour on several occasions.
>
> My conclusion quoting verbatim from my notes taken at the time" the claimants attitude demonstrated in court is appalling. Don't accept this is part of his condition – no evidence to uphold this.
> Accept he is upset and angry but his hostile, antagonistic and at times threatening behaviour is totally unacceptable.
> He challenges any form of authority or instruction or request by management. He views the entire work environment as conspiring against him and fellow Muslims"
>
> Hope above is of help. Plenty more quotes available from my contemporaneous notes if required. As you can gather, not the pleasant of cases to be dealing with.
>
> **Ilona Fox, second reply 16th February 2020.**
>
> Dear Jon
>
> Having had more time to read through the Appeal Court communication and reflect on it, I would like to amend the above reply and comments on the case to read as follows:
>
> The claimant was difficult and his behaviour during the hearing was very challenging. As a result, the judge had to intervene on a number of occasions and tried very hard to explain to the claimant how the system worked.

> I feel that we did our outmost as a tribunal to fully consider all the facts and evidence put before us by both sides and to make a judgement based on these.
>
> I feel that we acted perfectly fairly and professionally throughout.

6. The preliminary hearing in that previous appeal was listed before Choudhury J, the then President of the Employment Appeal Tribunal. The appellant was represented by counsel acting under the ELAAS scheme at that hearing. There is no transcript of that hearing before us or of the judgment that Choudhury J gave. However, it is agreed between the parties that the claimant did rely specifically on Mrs Fox's two replies as part of his argument in relation to bias at that hearing. Permission was refused by Choudhury J on the bias ground.

7. The other grounds went on to a final hearing before HHJ Beard who upheld the appeal in part and invited submissions from the parties as to whether the matter should be remitted to the same tribunal or to a differently constituted tribunal. The parties agreed that the matter should be remitted to the same tribunal. The claimant did not seek to raise any element of his bias argument again at that point in order to resist the appeal going back to the same tribunal. HHJ Beard duly ordered that the matter should be remitted to the same tribunal on 5 August 2022. The claimant explained to us at this hearing that he had considered whether or not to raise further challenge or to rely further on the bias argument, but decided not to do so at that point having taken legal advice.

8. On 5 May 2023 the case was listed for a closed telephone preliminary hearing before EJ Butler for the purpose of giving directions for the remitted hearing. At paragraph 2 of EJ Butler's order following that hearing, it read as follows:

> "Unfortunately, the claimant's conduct throughout the hearing was rude, abusive and unreasonable towards both me and Mr Paulin. As a result, I advised the parties that I would not make any orders or continue the hearing until I had referred the matter to the regional employment judge, which I have now done."

It appears that, having consulted with REJ Findlay, EJ Butler recused himself from further involvement with the case. We notice that he had also moved out of region but that does not appear to have been the reason why he decided not to continue.

9. The matter was then listed for a preliminary hearing before REJ Findlay on 28 July 2023. At that hearing, REJ Findlay proposed that the remitted hearing should be dealt with by a new judge but with the same lay members who decided the case previously, ie Mrs Fox and Mr Greatorex. The claimant objected to that course but REJ Findlay so directed. The material part of REJ Findlay's written reasons for her decision reads as follows

> 5. The only reasons provided by the claimant to me for objecting to the continued involvement of the same non-legal members was because he considered that they were biased, having found against him at the previous final hearing, and he also referred to the document from Mrs Fox (dated 15 and 16 February 2020 and provided to the EAT before the appeal hearing) which he later attached to his email sent at 2.51pm on 28 July 2023.
>
> 6. When he made the ruling on 5 August 2022, Judge Beard had received written representations from both parties. He must have had available to him the comments of Mrs Ilona Fox which were sent to the Appeal Tribunal at an earlier stage. It is not within my power to vary the order of Judge Beard, and in any case, I would see no reason to do so. It is currently both possible and reasonably practicable for both Mr Greatorex and Mrs Fox to attend (and to sit upon) the final hearing on 21-24 May 2024 inclusive. The claimant is available then, and I have asked the respondent to let the Tribunal know by 11 August 2023 if it is not possible for any of their witnesses to attend between those dates.
>
> 7. This case was previously listed before Employment Judge Michael Butler to give the relevant directions for the remitted hearing, at a telephone hearing on the 5th of May 2023. There had been some delay, due to pressures on the tribunal administration, and due to Judge Butler no longer sitting in this region.
>
> 8. On the 5th of May 2023, Judge Butler recorded in his order (signed on the same day)), that the claimant's conduct throughout that hearing was rude, abusive and unreasonable towards both himself and Mr Paulin, counsel representing the respondent. Administrative staff were aware that the claimant had left part way through the telephone hearing and that he was contacting the Tribunal and asking that the Judge to telephone him back (rather than calling into the hearing using the details previously provided to him).

> 9. The staff advised the claimant that Judges do not call parties, and the claimant eventually re-joined the telephone hearing briefly. At the point that the claimant returned to the call, a member of Tribunal staff was monitoring the call and heard the respondent's counsel (who seemed unaware that the claimant had just rejoined the call) remark to the Judge that he should not have to receive abuse from the claimant "on a sunny Friday morning" and said that the judge should "have a drink later". This was an inappropriate remark by the respondent's counsel; it could not have been anticipated by the Judge, of whom I make no criticism. The claimant then suggested that the Judge and counsel had been "talking about drinking", as confirmed in the claimant's e-mail on the 20th of July 2023. All others present on the call say that the claimant then abruptly left that hearing, which the Judge then terminated, although the claimant says, in his email dated 20 July 2023 at 12.18pm, that Judge Butler ended the hearing after the claimant asked why "he and the barrister Mr Paulin" were "talking about drinking".
>
> 10. Judge Butler later informed me that due to the claimant's behaviour he was recusing himself. It is no longer practicable, therefore, for Judge Butler to hear the case. I will therefore substitute a different Employment Judge under regulation 9 of the relevant regulations but retain the same members in the interests of the overriding objective.
>
> 11. Judge Butler did not suggest that a fair hearing was no longer possible due to the claimant's lack of cooperation, and so I have not listed a hearing to consider strike out of the remainder of the claim, but I did warn both parties that if there was any unreasonable conduct at today's hearing I would consider all options available to me, including listing a hearing to consider strike out of the claim or, if applicable, the response.

10. The final hearing then did take place in accordance with REJ Findlay's order in May 2024. The claimant has explained at this hearing that he sent in written submissions for that hearing which included an appendix setting out further arguments in relation to bias, but he did not attend the hearing because of his objections to the Tribunal. His bias arguments were not, he says, dealt with by the tribunal in its final decision.

11. The appellant now appeals to the Employment Appeal Tribunal on the ground that REJ Findlay erred in directing that the remitted hearing should be heard by the same panel members with a new judge. He relies on the combination of EJ Butler's decision to recuse himself because of the claimant's behaviour and Mrs Fox's two responses to the EAT commenting previously on the bias grounds.

12. Permission was refused on the paper sift by HHJ Beard but granted by HHJ Barklem following a hearing under rule 3(10). HHJ Barklem observed as follows in granting permission to appeal

> Rule 3(10) application
> Reason/s Allowed To Proceed
>
> REASONS:
>
> In the first paragraph of Ms Fox's first comments she commented "we found the claimant to be a difficult and thoroughly unpleasant individual". It is notable that on the following day she sought to tone down her comments.
>
> It seems to me that it is arguable that this comment – which begins with the word "we" suggesting that was a collective view - crosses the threshold under the test for apparent bias and that the regional employment judge erred in law in refusing to arrange new non-legal members, the Employment Judge having already recused himself.
>
> I consider that the input of lay members would be useful in determining this question, which requires an objective appraisal.

The law

13. We now deal with the law on bias. In *Serafin v Malkiewicz* [2020] UKSC 23 at paragraph 38 the Supreme Court assumed, without deciding, that the following was a fair definition of bias in contexts such as the present:

> "Bias means a prejudice against one party or its case for reasons unconnected with the merits of the case."

14. Guidance on the principles to be applied is most conveniently found in the case of *Ansar v Lloyds TSB Bank Plc* [2006] EWCA Civ 1462, in particular at paragraph 14 in that case where the Court of Appeal approved the principles set out by Burton J when the case was before the Employment Appeal Tribunal:

> 14. Burton J on that issue considered the authorities relating to bias. He also considered the decisions of the Employment Appeal Tribunal, which could have been said to support Mr Ansar's argument, and he summarised the law with some care in his judgment. Indeed his summary of the law and the

points that arise from the various cases in this area has been accepted by Mr Ansar as an accurate summary, being a summary it should be said prepared by Mr Gidney. He obviously himself accepts that summary. Burton J sets out that summary in paragraph 13 of his judgment as he puts it, slightly reordering the propositions, and they run from 1 to 11:

"l. The test to be applied as stated by Lord Hope in Porter v Magill 620021 2 AC 357, at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 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.

"2. If an objection of bias is then made, it will be the duty of the Chairman 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 at para 21.

"3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [l9861] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at para 22.

"4. 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: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in Locabail at para 24.

"5. The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in Lodwick, at para 18.

"6. 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: Locabail at para 25.

"7. 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 above, at para 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell UKEAT/0873/03 at para 41.

"8. 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: Sedley LJ in Bennett at para 19.

"9. 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 Simpler & CO Ltd v Cooke [l986] IRLR 19 EAT at para 17.

"10. In any case where there is real ground for doubt, that doubt

should be resolved in favour of recusal: Locabail at para 25.

> "11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at para 25) if:
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> "a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or
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> "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; or,
>
> "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; or,
>
> "d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of 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. 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."

15. We have also been referred *to British Car Auctions Ltd v Adams* UKEAT/0159/12/SM and UKEAT/0347/12/SM a judgment of the Employment Appeal Tribunal, Langstaff J, then the President, sitting with members. Of particular significance in that case to the present is that the Employment Appeal Tribunal in that case considered that a material factor in the appearance of bias arising was that it appeared that the lay member in that case had been consciously hiding his personal connections with the respondent by not raising them at the start of the hearing although there was evidence that he was already investigating whether he did have personal connections and the extent of them. In that case, the lay member's son worked for a company in the respondent's group and the lay member was related by marriage to someone who had been named in the claim form and the response document but had not raised these matters at the start of the hearing.

16. We have also been referred to *Laing v Bury and Bolton Citizens Advice* 2022] EAT 85, a decision of the Employment Appeal Tribunal, HHJ Auerbach sitting with lay members, including Mr Aziz who is sitting on this panel today. That case has certain parallels with the present in terms of the allegations of bias being based in large part on what was said in the judgment about the

claimant in that case. The passages from the Employment Tribunal's judgment at paragraphs 102 to 106 of that case show the sort of language that was used and we have had regard to that. We then have also had particular regard to paragraphs 116 to 124 of that case, which provide as follows:-

> 116. But even taking all of that into account, we do find some cause for concern in the content of this decision, having regard to three related features, and the overall impression created. The first is that there are indeed repeated references to the way the claimant behaved during the course of the hearing, including when wearing the hat of representative, not just when giving evidence. The second is that some of the language, including phrases highlighted by Mr Singh, is indeed particularly strong and personalised. The third is that there is an intermingling at several points, of the tribunal's assessment of how he behaved in the workplace and how he behaved before the tribunal, for example at paragraphs [9] and [10], which are interposed into the chronological narrative and blend findings about the claimant's behaviour in these two contexts, and at [54] where the tribunal appears to draw directly on his behaviour in the hearing in support of its view of how he must have behaved in the workplace. Again at [57] the tribunal refer to his behaviour in the workplace exhibiting "a fundamental inability to accept direction as witnessed by the tribunal".
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> 117. Because the live complaint was of victimisation, even if the tribunal concluded that the decision to dismiss was mainly influenced by Mr Wilkinson's belief about how the claimant had behaved towards colleagues, that would not, of itself, preclude a finding, if there was a protected act on 3 June, that this also materially influenced the decision to dismiss. But the foregoing combination of features of the tribunal's reasoning risks creating the impression in the mind of the fair-minded informed reader that the tribunal may, even if unconsciously, have allowed the very poor impression created upon it by the claimant's conduct in the course of the hearing to drive their conclusions.
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> 118. That observer would also, nevertheless, take into account that the tribunal recorded in its decision that it took a number of positive steps to allow the claimant some latitude as a litigant in person. It also specifically addressed the risk that it might be influenced by his having made recusal applications, and the contents thereof; and it did not accede to the respondent's invitations that it find that the claimant had acted in bad faith, and to pronounce on whether he held misogynistic views. The tribunal may therefore be said, in relation to these aspects, to have taken care not to allow itself to be influenced by any antipathetic feelings engendered by the claimant's behaviour during the hearing.
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> 119. However, as noted, Mr Singh also placed particular reliance on the remark of the lay member Mr Wilson, in comments to the EAT which we have earlier cited. The three members of the EAT have carefully reflected on the impact which that might be said to have on the fair-minded and informed reader. That observer would, it seems to us, know, and take into account, that, at the very start of the hearing the claimant did make a number of applications, and after the tribunal's day-one rulings all went against him,

wrote to the acting REJ overnight applying for the judge to be replaced, and that there were instances during the course of the hearing of his resisting proper direction or guidance from the judge, and that there was a further recusal application later in the week.

120. To be quite clear, against that backcloth, we do not consider that the fair-minded informed observer would entertain any concern at all about the possibility of there having been some form or subconscious stereotyping on the part of any member of the tribunal. Rather, the natural reading of the lay member's remarks is that they are an unvarnished comment on these features of the claimant's actual conduct from the outset, and during the course, of the four-day hearing.

121. However, what the three members of the EAT considering this appeal have concluded is that the fair-minded and informed observer, reading the decision in the round, and taking account of all the features that we have described, would be left with a concern that there was a real possibility that the way in which the claimant behaved from the very outset of the hearing, engendered, unconsciously, a lack of sympathy for him and his case, which gave rise to a form of unconscious confirmation bias, resulting in a final collective analysis of the key issues of whether what was said on 3 June amounted to a protected act, and, if so, whether it materially influenced the decision to dismiss, that was less rigorous and disciplined than it needed to be.

122. With real regret we feel bound also to conclude that that observer would consider that such concerns are not allayed by the particular comments of the lay member on which Mr Singh placed particular reliance, but that they chime with those concerns. Nor would that feeling be assuaged by the fact that the comments of all three tribunal members fully address and answer the claimant's criticisms of the tribunal's conduct and management of the hearing itself, as we have described.

123. To repeat, it appears to us that it was the claimant's own conduct, and the behaviours that he exhibited, during the course of the hearing before the tribunal that led to this effect. As we have described, we reject his particular criticisms of the way in which the judge managed the hearing and particular incidents during the course of it. That was not unfair to him. But it is perhaps when a litigant in person has behaved particularly challengingly during the course of a hearing, that the members of the tribunal need to be particularly on their mettle to ensure that they do not allow this to influence their reasoning process on the critical issues when it comes to their decision. It seems to us that, standing back, the fair-minded and informed observer would conclude that, unfortunately, there was a real possibility that that is what happened in this case.

124. For this reason we have concluded that the tribunal's substantive decision on the victimisation complaint is not safe, and the appeal against it must be allowed.

Discussion and conclusions

17. We have today heard oral submissions from Mr Ahmed and from Mr Tinkler for the respondent. We do not attempt to summarise the submissions but are grateful to both parties for the careful way in which they have presented their cases. We deal with the principal points of their respective arguments in our reasons.

18. We deal first of all with an issue that arose as to what REJ Findlay considered to be the scope of her discretion in relation to deciding who should sit on the remitted hearing. This point is a side issue, but we deal with it for the following reasons. At paragraph 6 of her written reasons, REJ Findlay observed that:

> "It is not within my power to vary the order of Judge Beard, and in any case, I would see no reason to do so."

She went on to explain why she considered it was currently both possible and reasonably practicable for both Mr Greatorex and Mrs Fox to attend and sit on the final hearing, those words "possible and reasonably practicable" reflecting the terminology that HHJ Beard had used when remitting the case to the tribunal, he having said that the case should be remitted for rehearing by the same tribunal unless:

> "In the view of the learned regional employment judge factors emerge which render such an arrangement impracticable or impossible, in which case the matter be remitted to be heard by a differently constituted tribunal."

19. We observe that, plainly, it would be impossible or impracticable for a panel member to continue on a hearing if their participation was vitiated by bias or the appearance of bias and indeed that is, of course, the basis on which EJ Butler was replaced. We take what REJ Findlay said about her powers in paragraph 6 as reflecting simply her view that bias had not arisen in relation to the continued participation of Mrs Fox and Mr Greatorex, rather than that she had no power to vary HHJ Butler's order if necessary to avoid an appearance of bias.

20. We also make this observation, which is that when she said in that paragraph that HHJ Beard must have taken account of the bias argument in deciding to remit to the same tribunal, it is apparent that that is not what happened because the claimant did not raise the bias argument with HHJ Beard. However, the bias argument had, of course, been previously considered by Choudhury J. We deal with the implications of that below.

21. However, we as a new EAT panel must decide for ourselves whether or not an appearance of bias had arisen in relation to at least Mrs Fox and indirectly Mr Greatorex as the other panel member on the basis of the claimant's full arguments. The parties are in agreement that it is for us to make that decision. That is in line with Burton P's fifth principle as it was set out in the *Ansar* case, i.e. that it is for the Employment Appeal Tribunal on appeal decide whether or not the appearance of bias has arisen applying the relevant principles; the Employment Appeal Tribunal is not confined merely to reviewing the decision of the first instance judge. That is, of course, subject to the argument about *res judicata* which is the point to which we now turn.

22. Despite the best researches of the respondent's counsel, Mr Tinkler, we have not been referred to any authority dealing specifically with how *res judicata* or abuse of process principles might apply to allegations of bias. Mr Tinkler has referred us to the well-known passage at paragraph 17 of the Supreme Court's decision in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] 1 AC 160 in which Lord Sumption summarises the relevant legal principles. Mr Tinkler's argument is essentially that there is an issue estoppel in relation to the argument that the claimant seeks to make about Mrs Fox's emails. So far as Mrs Fox's emails are concerned, Mr Tinkler submits that the question of whether they give rise to an appearance of bias is a common issue in terms of what was before Choudhury J at the permission hearing in the previous EAT appeal and what is before us and he submits that we cannot depart from Choudhury J's view that it was not

arguable that those email comments gave rise to an appearance of bias.

23. However, Mr Tinkler did accept when questioned that the *res judicata* principle cannot always work quite like that so far as concerns bias arguments. In principle he accepts that material that is judged insufficient to found a bias argument at point X in time may be relied upon together with subsequent events to found a bias argument at point Y. He simply submits that this is not such a case and that the claimant is, in effect, making an artificial link between Mrs Fox's previous email comments and EJ Butler's subsequent recusal in order to rerun the same bias argument in relation to Mrs Fox that previously failed before Choudhury J.

24. We are content to accept Mr Tinkler's submissions as to the applicable legal principles. However, we consider that this is a case where what has happened since Choudhury J's decision in terms of the recusal of EJ Butler and the circumstances surrounding that does cast a different complexion on Mrs Fox's email comments and also strengthens the appearance of bias in relation to her and, albeit more indirectly, in relation to Mr Greatorex as the third member of that panel. The reasons we so conclude are as follows.

25. First, this is not a case, it seems to us, of the claimant simply refusing to accept the judgment of Choudhury J and repeatedly raising arguments that have failed. Although the claimant was unhappy about the rejection of the bias ground, he did not pursue it further and did not even raise it again in order to resist the appeal going back to the same tribunal when invited to make submissions on that point by HHJ Beard. He only raised his objections again once EJ Butler had recused himself. That indicates to us that the claimant himself viewed that as a development of significance. Of course, that does not take us very far as regards the view of the fair-minded and informed observer, but it is part of the picture.

26. So far as the recusal of EJ Butler himself is concerned, it is important to consider what the fair-minded and informed observer knows about the reasons for that. At paragraph 10 of REJ Findlay's order, she states that Judge Butler "later informed me that due to the claimant's behaviour he was recusing himself", the "later" being reference to a time after the May 2023 preliminary hearing.

27. Mr Tinkler referred also to the possibility that EJ Butler had taken into account the claimant complaining that EJ Butler and counsel were "talking about drinking" when he rejoined that hearing by telephone in May 2023, but REJ Findlay does not refer to that element of events at the May 2023 preliminary hearing in her order, and we do not consider that in those circumstances the fair-minded observer would speculate about whether that element of what had happened had formed part of EJ Butler's reasons for recusing or not. The reasons as they are stated in REJ Findlay's order relate solely, apparently, to the claimant's behaviour.

28. We do, however, consider that the fair-minded and informed observer would proceed on the basis that EJ Butler had at least sought to apply the relevant legal principles when deciding to recuse himself and that, in line with the guidance in *Ansar*, he did not do so lightly, but only because he considered that, as a result of the claimant's behaviour, either he could no longer trust himself to decide the case solely on its merits, or that there was a real risk that the fair-minded and informed observer would have that perception. As such, we consider that the fact of EJ Butler's recusal by itself adds weight to the bias argument that the claimant raised previously before Choudhury J.

29. EJ Butler's description of the claimant's behaviour at the May 2023 preliminary hearing is of behaviour that was similar in kind to what he, Mrs Fox and Mr Greatorex described as occurring at the previous final hearing. It was, if we can put it like this, 'just' more of the same, but it pushed

the judge himself over the edge into recognising of his own motion that the bias threshold had been crossed. That of itself suggests to us that the claimant's argument previously was closer to being a valid bias argument than it was perceived to be by Choudhury J. In itself, it provides some confirmation that the claimant was right to perceive that his conduct was generating a level of animosity, or an appearance of such, in the panel that amounted to apparent bias.

30. The employment judge's recusal also specifically strengthens the appearance of animosity towards the claimant that is gained from Mrs Fox's comments in her emails, in particular in her first email with what has been described as her "unvarnished comments". In that email, she used the collective term "we" to describe how she and, it appears, the panel was feeling about the claimant, ie the whole panel, the employment judge and Mr Greatorex. What happened subsequently with the employment judge's recusal again adds strength to the appearance of animosity generated by what Mrs Fox wrote at the time in her email.

31. The fair-minded and informed observer would also recognise that the employment judge was unlikely to have recused himself if that May 2023 case management hearing had been his only interaction with the claimant. The fair-minded and informed observer would recognise that what happened at the May 2023 case management hearing and the employment judge's reaction to it was not an isolated incident but directly connected to what had happened previously at the final hearing. That would provide a basis for the fair-minded and informed observer to consider that there was a real risk that the other panel members would feel similarly or that they would do once they had been apprised of what had happened with EJ Butler at that further case management hearing as they inevitably would be before the final hearing.

32. We add in this regard that it concerns us somewhat that the lay members were not involved in the question of whether they should continue sitting on the hearing in the light of EJ Butler's

decision to recuse himself. We would observe that this is a matter that REJ Findlay could potentially have considered, although we emphasise that the failure to look into that aspect has added nothing to our views of whether or not an appearance of bias has arisen in this case. It is merely an observation from us as a panel comprising two experienced lay members as to the process that might be followed in such cases in future.

33. We now turn to Mrs Fox's comments themselves. As we have said, we consider the force of them is strengthened by what happened subsequently with EJ Butler. The language used in her first unvarnished email is, in our judgment, intemperate and crosses the line into giving an appearance of animosity towards the claimant that would give the fair-minded and informed observer the impression that their case would not be decided solely on its merits. We highlight terms such as "thoroughly unpleasant individual", "aggressive and confrontational", "appalling" attitude *et cetera*.

34. Her apparently verbatim notes made at the time show that she was at least potentially also committing the error identified in the *Laing v Bury* case of equating the claimant's conduct at the hearing as his own representative with his conduct in the workplace, a factor which in *Laing v Bury* the Employment Appeal Tribunal considered added to the appearance of bias. In that regard, we are referring in particular to what she says about the claimant challenging any form of authority, or instruction, or request by management and viewing the entire work environment as conspiring against him and fellow Muslims.

35. As regards that comment about him and fellow Muslims, we make just this observation. Although there is a sense of discomfort about that reference and, in particular, about the removal of that reference in her second email, the claimant has not placed much weight on that in his submissions to us. Without knowing more about what went on at the first Employment Tribunal final hearing, we think the fair-minded and informed observer would recognise that they were not in

a position to judge whether the comment about Muslims was just a factual account of what happened at the first hearing or whether it adds anything to the bias argument. We have therefore put that point to one side in our consideration of the case.

36. As to Mrs Fox's revision of her comments in her second email, we do consider that the mere fact of her changing her comments indicates that she was seeking to hide something. Taking our guidance from the *British Car Auctions* case, that fact by itself adds something to the appearance of bias. We also go a little further than that. We consider that, in this particular case, the fair-minded observer would see her revision as recognising that the intemperate language used in her first version could be perceived as bias, or at the least as fuelling the claimant's grounds of appeal as they had been advanced in that previous appeal, rather than rebutting those grounds as she appeared to think she was doing in her first email.

37. When in her second email she says "having had more time to read through the appeal court communication", it seems to us that she has on second reading understood what the point of the appeal was in a way that she did not when she first provided her response. In short, the fair-minded and informed observer would, we think, read her second set of comments as trying to hide her true feelings and views about the claimant from the parties and the Employment Appeal Tribunal and, as in the *British Car Auctions* case, that adds something to the appearance of bias.

38. Putting all those matters together, we are satisfied, applying the fair-minded and informed observer test, that the complete picture following EJ Butler's recusal was that an appearance of bias had arisen in relation to Mrs Fox, and by a side wind also Mr Greatorex whose views Mrs Fox purported in her email to represent.

39. It follows that this appeal must be allowed and that the matter will need to be remitted for rehearing before a fresh tribunal panel unless there is an alternative, on which the parties will have

an opportunity to make submissions.

Post-script

40. The parties made written submissions subsequent to the hearing in which they agreed that the case should be remitted to a newly constituted Tribunal. We agreed, and so ordered.