

Neutral Citation Number: [2026] EAT 111

Case No: EA-2026-000336-AT
EA-2026-000338-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 July 2026

Before:

JOHN BOWERS KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

DR BEENA KUMARI

Appellant

- and -

LEICESTERSHIRE PARTNERSHIP NHS TRUST

Respondent

Mr D Stephenson (instructed by Arch Law) for the **Appellant**
Mr M Sutton KC (instructed by Browne Jacobson LLP) for the **Respondent**

Hearing date: 21 July 2026

JUDGMENT

SUMMARY

Bias by tribunal members; reference to a decision:

The Claimant's case and that of Dr Benaris with whom she worked were initially consolidated but then were deconsolidated. The Benaris tribunal dismissed all of her claims. The Claimant applied for the recusal of the three member tribunal because of allegedly trenchant findings by the Benaris tribunal in respect of two reports which were relevant in both cases. She also contended that the Benaris judgment should not go before the tribunal in her case.

The EAT held that the tribunal judge had been correct not to recuse himself or either of the lay members. Further although there was jurisdiction in the tribunal to exclude the Benaris tribunal judgment it was not necessary to do so.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

1. I gave my outline decision after the hearing on 21 July given the closeness of the 20 day hearing in September 2026. These are my reasons for that decision.
2. The Claimant claimed on 3 April 2023,
 - a. Direct sex discrimination under s.13 Equality Act 2010 (“EqA”);
 - b. Harassment related to sex under s.26 EqA;
 - c. Victimisation under section 27 EqA;
 - d. Whistleblowing detriment under s.47B Employment Rights Act 1996 (ERA) and
 - e. Unfair constructive dismissal/Automatic constructive unfair dismissal under s.95(c) and s.103A ERA 1996.
3. It is necessary to understand the chronology of events in this case which I now summarise. On 23 November 2023, EJ Welch directed that the Claimant’s claims be consolidated with Dr Benaris’ Case No: 2601354/2023 against the same Respondent which appeared to raise many of the same issues as in this one. Importantly for this appeal, the contents of two important reports to which I will refer in more detail were common to both cases.
4. On 31 January 2025, EJ Adkinson directed that the Claimant’s and Dr Benaris’ claims be deconsolidated and heard separately and that either party may rely in the Claimant’s case on an official transcript of the final hearing in the Benaris claim.
5. Between 9 April and 6 May 2025, the Benaris Final Hearing was heard by EJ Adkinson, and as lay members Ms F French and Mr C Tansley, and the judgment was sent to the parties on 29 August 2025. Dr Benaris lost all of her claims which were (it should be said) different to the Claimant’s.
6. On 25 January 2026, the Claimant applied for EJ Adkinson and the non-legal members to recuse themselves from presiding over her liability hearing on the grounds of apparent bias, noting that the findings made in the Benaris case created a real risk of apparent bias and prejudgment in relation to her case.

7. The central plank of the Claimant’s recusal application arose from the findings of fact made by the Benaris Tribunal concerning the Pugh Report, on human relations within the Trust where the tribunal say

- i. they “reject any criticism of the report”;
- ii. “The report and conclusions cannot be impugned”;
- iii. “It is an impressive, thorough document”;
- iv. “Based on a reasonable investigation...”;
- v. “It does not come close to falling short of what they would expect to see in the workplace with the Trust’s resources and size”.

8. The Claimant also relies for the assertion of apparent bias on the findings of the Whistleblowing Investigation (carried out by Messrs Rathore and Crossley), where the Benaris Tribunal found:

- i. “It was based on detailed interviews with 10 witnesses”;
- ii. “Everyone who should have been interviewed had been interviewed”;
- iii. “It was thorough, lengthy, detailed, well-reasoned and cross-referenced”;
- iv. “There was nothing suggesting it was influenced by protected disclosures”;
- v. “It represented the honestly held opinions of the authors”.

These are quite trenchant and clear findings in respect of both Reports but not in my view “over the top” and they do not reflect on the honesty of either of the parties. I think the references to the inference of bias from the trenchancy of comments in the authorities referred to below refers more to strong conclusions on the credibility of witnesses (or strong statements made in the course of a hearing) rather than findings in respect of a report.

9. On 26 January 2026, EJ Adkinson determined the Claimant’s application for recusal on the papers and thus without an oral hearing. In summary, he rejected her application on the basis that the fair-minded informed observer would:

- i. not believe that the words used were of such nature to suggest a real possibility of bias;

- ii. read them in context and see not only the parts the claimant quotes but also the explanations and context surrounding them and conclude they would recognise that they arose from the case the Tribunal was then presented and not the Claimant's case.

How the Judge expressed himself on this matter (and the scope of what he took into account) is one of the issues in contention on this appeal so I will revert to it below.

10. On 28 January 2026, EJ Adkinson refused the Claimant's application for a reconsideration a second time on the basis that the risk of what the Claimant perceived as adverse findings existed at the time of the original application. He decided that the fact that the Benaris Tribunal has made what the Claimant perceives as wrong or adverse findings which may affect her claim is not a change in circumstances to depart from the prior case management orders about bundles or statements. He also expressed confidence that the Tribunal hearing the Claimant's case was well able to

1. recognise and appreciate that her claims raised different factual and legal issues
2. appreciate that the evidence and submissions in her claim may point to a different factual or legal conclusion.

11. On 10 February 2026, the Claimant applied for Reconsideration/Variation of EJ Adkinson's Order made and this was rejected.

12. On 5 June 2026, Regional Employment Judge Clark considered the Claimant's reconsideration application as an application to vary case management orders where there has been a material change in circumstances or where there is otherwise a just reason do so. He directed that in light of EJ Adkinson no longer being available for the final hearing commencing 7 September 2026 (apparently for personal reasons) he varied the existing orders as follows:

- i. A new judge will be allocated to hear the final hearing;
- ii. As things stand, the non-legal members who sat on the Benaris hearing are neither tied to the Kumari hearing, nor are they recused from it.

13. Accordingly, REJ Clark directed that, in accordance with Rule 41 ET Rules 2024 and the overriding objective of securing the parties' right to a fair trial and furthering the interests of justice generally, it was a matter for the Tribunal at the final hearing to control the evidence that is put before it. REJ Clark notes that the party may seek to rely on the Benaris judgment when advancing their respective cases, but if they do, the Kumari Tribunal will decide whether it has any relevance, probative value and will undoubtedly have to consider the fairness of doing so.

The law

14. The relevant authorities on bias and recusal are well known. I will only consider those which are most relevant to the submissions on the particular issues in this case

(1) The general test of bias as stated by Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 is that "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. That is the test which the employment tribunal were required to apply when deciding whether the chairman should recuse himself. Before the Employment Appeal Tribunal, it was necessary first to test the employment tribunal's decision as to recusal in that way but also to consider the proceedings before the employment tribunal as a whole and decide whether a perception of bias has arisen."

(2) Fraser J said in *Bates v Post Office Ltd* [2019] EWHC 871 QB at [29] "Bias includes giving the impression of having pre-judged any issue."

(3) if there is a real ground for doubt as to bias, it should be resolved in favour of recusal: see *Locabail (UK) Ltd v Bayfield Properties* [2000] IRLR 96 at [25].

(4) Mummery LJ made clear in *Morrison v AWG Group Ltd* [2006] EWCA Civ 6, inconvenience, costs and delay do not count in a case where the principle of judicial impartiality is properly invoked at [6]: "This is because it is the fundamental principle of justice, both at common law and under Article 6 of the European Convention for the protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance".

(5) an impartial judge is a fundamental prerequisite for a fair trial, and a judicial officer should not hesitate to recuse himself if there are reasonable grounds for doing so: *Locabail*, at [21]

(6) the 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 latter case. Something more must be shown: *Lodwick v LB Southwark* [2004] IRLR 554 at [21]; see also Burton J in *Ansar v Lloyds Bank plc* [2007] IRLR 211 at para 17(7).

Ground 1; bias

15. The Appellant's grounds of appeal inevitably overlap to a degree but I will consider them separately. Ground 1 claimed that the ET erred in law by failing to correctly apply *Porter v Magill* to the material facts that were before it and ask itself, having regard to those facts, whether the fair-minded informed observer, when considering the facts and issues in the Claimant's case, would conclude that there is a real possibility of bias.

16. The main complaint (given that the Judge will not sit on the main hearing or any interim applications) was that the Benaris lay members if they sat in this case would not be able to divorce themselves from the strong comments they made about the two reports which were at the centre of both the Benaris case and this one. As I have said the authorities hold that the mere fact of an adverse finding or comment in a previous case does not justify a finding of bias without '*something more*' but Mr Stephenson said there was something more here, the trenchancy of the findings.

17. Although I have set them out in outline above it is necessary to home in in relation to the Pugh report because Mr Stephenson for the Appellant drew particular attention to the strong findings at paragraphs 289-290 where the ET said:

- a. "We reject any criticism of the [Pugh] report. In essence it reduces to the fact that one does not like the outcome. The option was available for Dr Benaris to appeal, but she did not do so. We can see no good reason why she did not...";
- b. "We cannot think of any person who it is clear should have been interviewed but was not. We see no good reason why she did not appeal";
- c. "We conclude that Ms Pugh's report and

conclusions cannot be impugned... it is an impressive, thorough document based on a reasonable investigation on the evidence...”.

18. Further the Benaris tribunal said this in relation to the Rathcore/Crossley whistleblowing investigation report at paragraphs 298,

a. “Again, this report was written after detailed interviews with 10 people all involved in the 9/10 July 2021 incident. We again cannot see anyone who was not interviewed who ought to have been. While the report is not as verbose as Ms Pugh’s report... it is thorough, lengthy, detailed, well-reasoned and cross-referenced to the evidence...”;

b. “While we cannot comment on its medical content, we can see nothing that suggests it is influenced in any way by the making of protected disclosures, or that it does not represent the honestly held opinions of the authors. We are satisfied in the circumstances it was completed within a reasonable amount of time”.

19. These are clear findings and the Appellant described them as “in definitive and categorical terms” and I would agree. I however have no doubt that the lay members faced with different evidence and advocacy in this case would be able and willing (if they thought it appropriate) to reach a different conclusion in this case. I fully understand the concepts of unconscious and confirmation bias but believe that the lay members would be true to their oath to decide the case according to the evidence called in this case which may be different to that considered in the Benaris case. There is no irretrievable conclusion that they would not.

20. Clearly where real ground for doubt exists, that doubt must be resolved in favour of recusal: See *Ansar* per LJ Waller at [14] but I do not think there is room for doubt here in the case of a fair minded observer who was conscious of the context.

21. It is evident from the Tribunal’s letter recording its decision on recusal dated 27 January 2026 that the Judge had considered and applied the test of whether there was a real possibility of bias, having regard to all the relevant circumstances and viewing matters from the perspective of the fair-minded and informed observer, and decided that there was not. I note what Mummery LJ said in *Sir Alexander Morrison v AWG Group Ltd* [2006] EWCA Civ 6 at para 19 “What is the position of this

court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion unless there had been an error of principle or unless his decision was plainly wrong". I do not think the judge committed an error of principle or was "plainly wrong".

Ground 2; bias considered as case management hearing

22. Mr Stephenson submitted that the judge treated the issue of recusal as though it were a case management order and weighed up factors which he should not have taken into account (Ground 2 of the Notice of Appeal). Whilst it is true that the Judge's letter of 27 January 2026 mentioned other matters he did say that "The *real question* [my italics] is whether the fair minded and informed observer would believe the words the Tribunal used are of such a nature to suggest a real possibility of bias. I conclude that they would not". That was the central question and I think the other matters referred to are just the context in which this question arose. He did not misdirect himself.

23. Another point raised by the Appellant was the failure of the Judge to grapple with the specific paragraphs referred to above in respect of the two reports and the trenchant findings. Whilst the Judge does not quote the particular paragraphs in the Benaris Judgment of which the Appellant complained it is clear he had them in mind as in the next sentence he talks about "the parts the claimant quotes" which was indeed primarily paras 289, 290 and 298 of the Benaris decision.

Ground 3; oral hearing

24. Ground 3 complained that the ET erred in law when considering the Claimant's recusal application without affording her the opportunity to be heard orally. I see no reason why the Judge should not decide this matter on the papers and the Appellant although acting as a litigant in person at the material time had had the benefit of legal advice beforehand, was clearly highly articulate and

had put in a very clear and comprehensive written argument. This way of proceeding is permitted by ET Rules of Procedure rules 31 and 58.

Ground 4; Reconsideration

25. Ground 4 complains that EJ Adkinson refused the Claimant's application for a reconsideration on 28 January 2026 on the basis that:

- a. It was in the reasonable contemplation of the parties that the Tribunal would have to deliver a judgment which would involve deciding on credibility and making findings of fact;
- b. The risk therefore of what the Claimant perceived as adverse findings existed then. The fact that the Benaris Tribunal has made what the Claimant perceives as wrong or adverse findings to her claim is not a change in circumstances to depart from the prior case management orders about bundles or statements.

I see no basis for criticising the Judge in his handling of the Reconsideration Application and it is fair to say that Mr Stephenson did not press this Ground very much in oral submissions.

Ground 5; the Benaris Judgment

26. The more difficult issue is Ground 5 as to whether this tribunal should exclude reference to the Benaris Decision. I have never heard of such an order being made but if it would constitute unfairness to a party then I accept that there is jurisdiction in the ET and EAT to make such an order. There is now no objection by the Appellant to the materials before the Benaris tribunal going before this tribunal but it is said that it would be prejudicial for the decision itself to go in.

27. EJ Adkinson in the Record of a Preliminary Hearing on 28 January 2026 said in Direction 10 that "it will be a matter for the Tribunal at the final hearing to decide what weight (if any) should be attached to those items". The Regional Employment Judge in his notification dated 5 June 2026 comments that "the Kumari tribunal will decide whether it [the Judgment] has any relevance, probative value and will undoubtedly have to consider the fairness of doing so". I agree with this

formulation which takes into account in a pithy way the considerable volume of authorities in this area.

28. Mr Stephenson however counters that this would be to restrain the horse after it has bolted or to let the genie out of the bottle. I disagree. Although it is true that Rule 41(3) of the ET Rules of Procedure provides that an ET is not *bound* by evidential rules relating to the admissibility of the evidence in civil proceedings the three member tribunal at the Full Hearing will take account of the recent decision of the Supreme Court in *Evans v Barclays Bank plc* [2025] UKSC 48 to the effect that any facts must be found in this case and not taken from another case. In particular the SC said

144. It is a general rule of the common law that findings made by another decisionmaker are not admissible as evidence of the facts found. This rule is often referred to “the rule in *Hollington v Hewthorn*”, after the leading case of *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 where the Court of Appeal held that the defendant’s conviction for careless driving was inadmissible in a subsequent civil claim for damages as evidence that the defendant was negligent. As explained by the Court of Appeal in *Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 265, 305, paras 39-40, the rule is founded on a principle of fairness. That principle requires that a tribunal responsible for finding facts should base its findings on its own evaluation of the evidence and not on the evaluation of someone else who is not the relevant decision-maker.

145. It would be particularly unfair to treat findings made by an earlier decision-maker as admissible against a person who was not a party to the earlier proceedings and who therefore had no opportunity to influence the findings made in those proceedings by adducing evidence or advancing arguments. This fundamental objection does not apply to someone who was a party to the earlier proceedings. In some cases, such a party may be bound by findings, for example where they give rise to an issue estoppel; or it may be an abuse of process for the party to contest them.”

I also have regard to what Lord Fairley said recently in *Lyfar Cisse v Brighton & Sussex University Hospitals NHS Trust* EAT 0100/19 at para 42. I detect no error of law in the formulations of REJ Clarke or EJ Adkinson on this point. There is thus no reason to bar the Kumari tribunal from seeing

the Benaris Judgment. Indeed it would be unfair not to let them see it and to encourage speculation about what it might contain.

Ground 6; lack of reasons

29. I reject Ground 6 which complained of lack of reasons being given by the tribunal judge. I think the Appellant should be clear why she lost on each application.

30. I accordingly dismiss the appeal but thank both parties for their helpful submissions.