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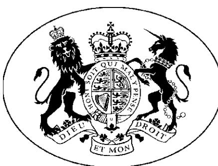

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Vatish	**v**	**The Crown Prosecution Service**
Third Party		**Mr J Sykes (Respondent to costs application)**

Heard at: London Central **On**: 1 February 2017

Before: Employment Judge Pearl (Sitting Alone)

Representation:

Claimant: Did not attend
Respondent: Mr J Bryan, Counsel
Mr J Sykes, In Person

JUDGMENT ON APPLICATION BY MR SYKES FOR THE TRIBUNAL TO RECUSE ITSELF

The Judgment of the Tribunal is that the recusal application fails.

REASONS

1 This was the hearing of Mr Sykes's application that I recuse myself from hearing the costs applications. He accepts that were I to accede to this application it would be necessary for the members also to stand down.

2 The applications have been made in two emails dated 15 and 19 October 2016. In essence, Mr Sykes relies upon two matters. First, the terms of part of the judgment on liability in this case and, second, the way in which I conducted a telephone case management discussion on 14 October 2016 and statements that I am alleged to have made during that hearing.

3 The liability judgment was promulgated on 5 April 2012. The hearing occupied the parties for about 29 days. The case was complex and there were some singular features of the way in which the hearing proceeded. The Tribunal referred to it as a fraught hearing. Because of what had occurred, the parties were directed to exchange with their final written submissions schedules of misconduct relating to the allegations that each representative made against the other. Mr Sykes appeared for the Claimant and Mr Heath of Counsel for the Respondent.

4 After the promulgation of the decision, the Respondent made an application for costs by letter dated 3 May 2012. This fell into two parts, a claim for costs against the Claimant and a claim for wasted costs made against Mr Sykes. This last application was based on alleged improper, unreasonable and negligent behaviour by him that had caused the Respondent to incur unnecessary costs. In support of that application reliance was placed on the schedule of misconduct that I have referred to.

5 The case has proceeded through the EAT and, thereafter, to the Court of Appeal where the Claimant made an unsuccessful application for leave to appeal and was heard by Counsel. This was determined in July 2015 and the consequence was that the costs applications made in 2012 could then proceed.

6 There was considerable delay because an application was made by the Claimant for recusal of this Tribunal. A hearing was listed for 24 June 2016 but on 17 June the application was withdrawn and the hearing was therefore vacated. As I was anxious to press on with the matter of costs, I caused correspondence be sent to the parties on 21 June and invited proposals for directions. At that point it appeared that Mr Heath might have been involved in the costs applications but, taking matters shortly, it has subsequently become clear that no application is made against him.

7 It was in these circumstances that a telephone hearing for directions was listed for 14 October 2016. I will later in these reasons have to deal with the detail of the allegations made about my conduct during that telephone hearing, but at this point it is material to recite what on that day I typed and had sent to the parties. The order to which the parties agreed over the telephone was that there should be a further case management telephone hearing in December and that the costs applications should remain listed for February 2017.

8 Under the heading "Issues and General Considerations" I wrote the following:-

> "The Respondent has its cost application against the Claimant and a wasted costs application against Mr Sykes. He makes the point that he understands this to be limited to the costs allegedly wasted by him during the hearing by, for example, over-long

> questioning. He does not understand the Respondent to be applying for its total costs against him, as an alternative target to the Claimant. He says that were this to be the case, he would inform the insurers and the hearing would be [sic] become longer and more complex. Mr Bryan says his solicitors must take instructions.
>
> As far as I can tell, the Claimant does not seek to blame Mr Sykes for costs that she considers she should not pay. Again, instructions will need to be taken. I observed that if any costs fall to Mr Sykes, the Claimant would clearly not want them to be recovered from her.
>
> The issues, therefore, are not as clear as they should be. B1 [the orders] below caters for this. I shall review the position at the next telephone hearing …
>
> Mr Sykes says he may seek a witness order from Mr Heath (who is no longer a party to an application.) If and when this materialises, I shall deal with it."

9 In my view, the terms of this commentary and the orders that follow are material to one part of Mr Sykes's application. Those orders included that the parties should by 4 November 2016 set out to the Tribunal and to each other a brief summary of the costs issues they consider require adjudication.

10 By 18 November the applications by the Respondent had to be served on the Tribunal and all parties; and any party wishing to set out a rejoinder had to do so by 9 December 2016. Further provisions for witness statements and a statement of costs were made. The significance of the orders is that, as I set out in the commentary at paragraph 3, it was necessary to seek as much clarity as possible on the issues in the costs applications.

11 Mr Sykes applied the next day, 15 October. His first application was that the hearing of the wasted costs application against him be held separately to any costs application. This has subsequently fallen away and I say no more about it. It is the second application that I am concerned with and it reads as follows: "That the hearing of wasted costs be heard by a different single judge appointed by the regional judge, based on written material including schedule and counter-schedule of wasted costs and legal submissions, with an opportunity for each side to make oral submissions. The time estimate will be limited to half a day, subject to application to vary for good cause."

12 The basis of this was to address "the real risk or danger of bias shown, with the greatest of respect, by the learned judge at trial and at the TPH today." Seven points are then relied upon. Three of them relate to comments I am said to have made during the telephone hearing and four relate to matters that occurred during the trial. I will, for convenience, at this point deal with one of those four matters straight away. It is that during the hearing on liability I referred to having been instructed for a substantial time by the CPS as counsel. This is a misconceived ground for the following reasons.

13 I never made such a statement during the hearing and close to the outset of the hearing of this application on 1 February Mr Sykes accepted that this was correct. The way he put matters was that I had referred to criminal procedure on a number of occasions and had said that I had been a member of the criminal bar; and that, in his view, I had "sympathy towards the CPS because I was instructed to do criminal work." He clarified by saying that this was a claim that I

had sympathy towards the Crown because of the criminal work that I had undertaken. These comments were made by Mr Sykes after I had made a short statement of my personal position at the outset of the hearing, on the basis that when dealing with bias applications it was important for the facts to be laid out as clearly as possible. Those facts are that between 1978, when I was in pupillage, and 1989 I was instructed in criminal work, largely for the defence. I did not prosecute for the Metropolitan Police and it was only on relatively rare occasions that I prosecuted for the Thames Valley Police in the Aylesbury, Reading and Oxford Crown Courts. I have not been able to recall a single instance when I was instructed by the CPS, although it is just possible that my very last prosecution was one such occasion. In any event, I had never dealt with anyone at the CPS by telephone or in correspondence, I had never settled an indictment or written advice on evidence for the CPS, I could recall no occasion when I had known anybody in a CPS office by name and, so far as I am concerned, I never had any professional relationship with the CPS. I might add that after 1989 or thereabouts, I concentrated exclusively on civil work.

14 In these circumstances, and having regard to the reformulated way in which Mr Sykes puts the point, it is clearly a bad point that I am either biased or that there is a case of apparent bias arising from my dealings with the CPS or the Crown. The reason that any question of criminal procedure was ever canvassed during the case is one that I can readily recollect. There were various allegations made by the Respondent against the Claimant of poor performance and some of these concerned what she had done or allegedly had not done during court hearings. There was, therefore, a need to cover some of those allegations and to clarify the points made. It is evident, as I agree, that when those allegations were being dealt with I indicated that I had some familiarity with criminal procedure, although I was many years out of date. There is no possible ground for recusal arising out of these facts.

15 It is next convenient to deal with the paragraphs of the decision that are relied upon by Mr Sykes in support of his recusal application. These are in Section 9 under the heading "Conduct of the Hearing." It is unnecessary to set out the thirteen paragraphs that occupy four pages of text. The entirety of that text needs to be read carefully and in full. To summarise, the Tribunal stated in paragraph 9.1 that the hearing had been very fraught and sometimes difficult; and that there were numerous protests by the parties' representatives about the conduct of the other.

16 In paragraph 9.2 we stated that "the relevance of the conduct of the parties is that each side, but the Claimant in particular, has said that the conduct, tactics and approach of the other has been in furtherance of a false claim or defence." We then noted that the Respondent's tactics were said to be underhand, deliberate and designed to obscure the truth. This was why we asked for schedules of criticisms that they each made against the other to be given to us with final submissions. We then stated as follows. "We need to emphasise that we are restricting our findings in this Section to the criticisms and allegations that have a bearing on the factual investigation we have undertaken. Other criticisms of unreasonable or unprofessional conduct, including allegations made by each

side of prolixity and irrelevant questioning, are omitted … We need to examine the criticisms and determine whether they have any bearing on the fact-finding."

17 Paragraph 9.5 dealt with an allegation that Mr Heath had called the Claimant a liar and our conclusions there can be seen. It is right to say that on this point we acquitted Mr Heath of an allegation of unprofessional conduct and we went on to deal with the allegation that he had deliberately caused a breakdown in the Claimant's mental health or well-being by his questioning. We said this had not happened and it was not what we had witnessed.

18 We also stated that the criticism made by Mr Sykes of Mr Heath in this regard was an implied criticism of the Tribunal for failing to intervene and we described this as "a serious misrepresentation of the facts and did not happen. There is no reflection of what he alleges in any of our notes and our individual recollections are to the contrary."

19 We dealt with an allegation that the Respondent had doctored the trial bundles in paragraphs 9.9 and 9.10 and in paragraph 9.11 we said that we had dealt with the principal allegations

> "because they have a direct bearing on the factual findings. There are a large number of counter-allegations of misconduct which are made against the Claimant's side and Mr Sykes in particular. We are not dealing with these arguments for present purposes but we do not wish to give the impression that these complaints may never have to be adjudicated upon. The reason we have dealt with only some of the allegations of misconduct is because we wish to restrict the exercise to those charges which, if established, could affect our findings of fact. It seems to us that the allegations raised by the Respondent relate to conduct of the proceedings and have no bearing on the factual matters set out above."

20 In paragraph 9.13 we said that the cross examination of Ms Boot had been very hostile and had overstepped the bounds of acceptable conduct and was also sometimes offensive. It then went on to deal with specific allegations that were directed towards Ms Boot.

21 Mr Sykes made his recusal application in moderate and realistic terms and with some considerable candour. For example, he mentioned early on in his submission that he thought that I had often not reacted to provocative things that had happened during the course of the trial; and that this was part of my case management style. Further, he volunteered that the Claimant had been given a great deal of latitude by the Tribunal, particularly in the way in which she was allowed to expand her case in oral evidence. He told me that "she had a hard case to prove". Mr Sykes made these comments alongside a submission that the reasonably informed observer might infer that the Tribunal was biased towards the Respondent, but I am bound to say that I do not think that consistently follows the description of the approach taken by the tribunal towards his former client during the hearing.

22 In other parts of his submission he told me that he recalled my adjourning the hearing at one point so that tempers could cool down. He also stated that he recalled accusing a witness "of sleeping his way through his career". He almost immediately added: "most of the time you did not intervene."

He then added that there were a number of points in the decision where the Tribunal had been complimentary to him, for example thanking him for his industry and, as he put it, this has to be put into the balance. He also told me, without any prompting whatsoever on my part, that he remembered calling the Respondent's witness a pervert. He was "trying to get a rise out of him. I threw it in." It was at this point in the trial that I admonished Mr Sykes, he says, using the term "curb your tongue". However, he recalls that I used a form of words along these lines: "If I was minded to reprimand you I would say curb your tongue".

23 I record some of these submissions because the atmosphere during this prolonged 29 day hearing was in many ways extraordinary and Mr Sykes in making his application freely acknowledged that. This needs to be borne in mind in respect of two of the criticisms that are made in his first letter of application dated 15 October 2016. The first is that he says I took offence at his comments about the Respondent's witnesses and counsel and it is in that context that he says I told him to "curb your tongue". He adds that elsewhere I am said to have commented that things he said were very offensive. The second matter is that I expressed "clear displeasure at the Claimant's advocate's moments of bad temper, (although not alone in expressing bad temper at the trial)". In the light of all the foregoing, I regard these points as having been to some extent qualified or diluted in the course of Mr Sykes's oral submissions. In any event, I have tried to provide, in a balanced way, some of the necessary background.

24 This leads me to the case management telephone discussion on 14 October last and I will deal first with a comment I made during that discussion which is the seventh point in the 15 October letter of application. The way it is put is that I said that I could not forget certain moments from the trial which I would "take to my grave." Mr Sykes is entirely accurate in recording that I said something along these lines during the telephone call. What he has omitted in that letter is the context of the comment and Mr Bryan agrees with my recollection and I agree with his. The comment was occasioned by a remark that Mr Sykes made to the effect that the trial had happened some years ago and that it may be difficult for the panel to remember exactly what had gone on. I then made the comment that he records. Although in his letter of application he says that the comment appeared connected to my suggesting the potential award against him of wasted costs in the sum of £20,000, I firmly reject such an interpretation. It was clearly an expression of my clear recollection of some of the unusual incidents that occurred during this hearing. Some of the matters contained in the schedules of misconduct are events which I can recall occurring.

25 I therefore turn to the remaining matters arising from the telephone case management hearing. A significant basis for Mr Sykes's application is the first matter that he raised in the 15 October letter namely "the EJ seeking to open grounds of wasted costs to include all cost grounds, when the wasted costs grounds were set down in February 2012 almost five years ago, and neither Respondent nor Claimant raised expansion of those grounds in any particular." He contends that this amounted to apparent bias because I ought not to have raised the matter, or if it was to be raised, I ought to have done so by merely confirming that the grounds of the application were as they had been expressed some four years earlier.

26 I need to record that I regard this as an inaccurate description of what I did at the telephone hearing. I have a note of the same and my first material note reads that the Respondent will take instructions on how the two applications interrelate. These notes show, as I remind myself, that my first concern was to identify the issues in the costs applications and, in particular how the costs application interrelated with the wasted costs application. I would refer again to the text that I sent to the parties that day and which began by recording Mr Sykes's contention that the wasted costs application was limited to those wasted by him, allegedly, during the hearing. I did not when I conducted the telephone hearing have the original application for costs before me because I could not locate it in the 'old file' (which currently stands 12 inches high). However, I have now seen it on this application. It is said that Mr Sykes's conduct of the case prolonged it and thereby added to the costs, but there is no particularisation of what is sought from him and, as important, there is no attempt to set out the relationship of the wasted costs application to the costs application against the Claimant. In my view, any Employment Judge conducting a case management hearing would, therefore, whether or not he or she had sight of the application of 3 May 2012, have sought to discover how much was being applied for in the case of Mr Sykes.

27 That I was aware of the potential complications of this case, and was attempting to define and narrow the issues, can be seen in the next comment in the text of Schedule A. Here I recorded that I did not consider the Claimant was seeking to blame Mr Sykes. However, in respect both of this point and also the precise basis of the application against Mr Sykes, the parties involved needed to take further instructions and that is why I made the orders that I did on 14 October.

28 The related matter of complaint in regard to this telephone hearing is that I commented "that a wasted costs award of £20,000 might be made against Mr Sykes and repeated this." In my view, this is factually incorrect and I understand the Respondent to make the same point. (I shall say a little more in the Conclusions.) In discussion with the parties, and I had three of them at the end of the telephone line, I sought to illustrate the difference between an application for, say, £20,000, as opposed to an application for the whole amount of the costs incurred. As I recorded in the text that was sent to the parties, the Claimant seemed to accept the point because Mr Sykes told me that if a higher sum was sought than he believed to be the case, he would need to inform insurers. I am quite confident that I never indicated, or could have been heard to indicate, that I had in mind a wasted costs order against Mr Sykes of £20,000. There would not have been any rationale to such a view and I do not consider that I even carelessly said something which could have been interpreted in that way.

Submissions

29 I am grateful to Mr Sykes and Mr Bryan for their written and oral submissions and where relevant I will refer to them below. As to the applicable law, I shall also set that out immediately below.

Conclusions

30 Both parties have referred to the key authorities. Porter v Magill mandates me to ask, after setting out all the circumstances, whether such circumstances would lead to a fair minded and informed observer concluding that there was a real possibility that I could be biased. Although I phrase this in the first person, in respect of the Reasons in the liability decision, the potential bias is that of the full Tribunal. It is clear from case law that when looking at the material circumstances this has to include the explanation given by the Judge under review. I, therefore, have approached what happened on 14 October in the telephone discussion with considerable care. Since I am the person impugned in the application, it is important that I take a fully objective view and acknowledge the possibility that I may be wrong either in my recollection or interpretation of events and that Mr Sykes may be right.

31 What are the qualities of the hypothetical fair minded and informed observer? Such a person can be expected to be aware of the legal tradition and culture of the jurisdiction. He would be neither complacent nor unduly sensitive or suspicious of that culture. The observer would remind himself that appearances are just as important as reality when the impartiality of a judge or a tribunal is in question. There is a need for absolute impartiality in the judiciary. All of this is derived from *Jones v DAS Legal Expenses Insurance* [2004] IRLR 218. It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial.

32 Mr Sykes has referred to in Re P [2001] EWCA Crim 1728 a decision of the Court of Appeal criminal division. Costs were at issue in that matter and Kennedy LJ set out the principle in respect of wasted costs, that the primary objective is not to punish but to compensate. The fifth principle he noted was as follows. "Although the Trial Judge can decline to consider an application in respect of costs, for example on the ground that he or she is personally embarrassed by an appearance of bias, it will only be in exceptional circumstances that it would be appropriate to pass the matter to another Judge, and the fact that, in the proper exercise of his judicial functions, a Judge has expressed views in relation to the conduct of a lawyer against whom an order is sought does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer."

33 In the case I shall refer to as Mengiste [2013] EWCA Civ 1003, Arden LJ referred to the principle that a Judge must step down in circumstances where there appears to be bias or, as it is put, apparent bias. She referred to the test I have set out above in Porter v Magill. The case that the Court of Appeal was dealing with in Mengiste was one that turned on its unusual facts. I omit the details of the case, but it is clear on a careful reading of the Court of Appeal Judgment that it was regarded as "an exceptional case": see paragraph 59. The Judge had dealt with the matter below in two judgments and in both of those judgments he had said things that gave rise to an appearance of bias. There was no necessity to make a series of findings that he made in the first instance and the fair minded observer would at that point have asked why he did so. His failure to leave the door open for the possibility of some explanation, when he had not

heard any evidence or submissions from the lawyers who were criticised, gave rise to an impression of bias. The repetition of his criticism in a further judgment, together with the addition of fresh criticisms of the lawyers (which Arden LJ thought was unjustified in any event), made those criticisms “extreme”.

34 Mr Bryan referred me to further dicta that he thought would be of assistance. In *Ansar v Lloyds TSB Bank plc* [2007] IRLR 211 the Court of Appeal noted that it was important that justice must be seen to be done but 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 heard by somebody thought to be more likely to decide the case in their favour. Mr Sykes contends that this is not what he is trying to do and, for my part, I consider that he is right in making that observation. However, the Ansar case also goes on to note the value in the more formal part of the judicial system, as well as the more informal Employment Tribunals, of the dialogue which frequently takes place between the Judge or Tribunal and the 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 irrelevances.” Further, in any case where this a real ground for doubt that should be resolved in favour of recusal.

35 In *Oni v NHS Leicester City* [2013] ICR 91, HHJ Richardson in the EAT dealt with an Employment Tribunal Judgment that had made further specific criticism of the conduct of the proceedings towards the conclusion of its reasons. The offending paragraph read: “In our view, not only was the bringing of the various claims unreasonable but the manner in which they had been conducted was also unreasonable.” That language mirrored the wording of the rule that was then applicable as to the criterion for making a costs order.

36 It is helpful again to note the test. The Appeal Tribunal (in that case) “must first ascertain all the circumstances which have a bearing on the suggestion that the Tribunal was biased. It must then ask whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.”

37 HHJ Richardson then noted that it is generally in the public interest that issues such as costs are dealt with by the same panel. However, it was important that a Tribunal “should not express itself in a way which tends to demonstrate that it has already made up its mind, prior to hearing argument, not only on the issues it had to decide but also on issues which only fall for decision if an application for costs is made. If a Tribunal does this, the fair-minded and informed observer will conclude that there is a real possibility that the Tribunal has pre-judged the question of costs.” He went on to say that it was inescapable that what was said towards the conclusion of the reasons crossed the line and would lead a fair-minded and informed observer to conclude that the issue was prejudged.

38 In paragraph 34 he said: “The lesson, it seems to us, is this. A Tribunal dealing with the question of liability can and should express itself fully and properly on that issue, making if called for trenchant findings about credibility and explaining if necessary the case management decisions during the hearing even if

this involves expressing views about the reasonableness of the conduct of a party which led to the case management decision in question. A Tribunal should not however reach or express concluded views which really anticipate arguments on the question of costs which have not yet been put before it." With all this important guidance in mind, I turn to the various grounds that were asserted for recusal.

39 Mr Sykes submits that in the passages in Section 9 that I have referred to the Tribunal pre-judged the costs question and/or invited the Respondent to make a wasted costs application against him. There are two objections to this argument. First, the Tribunal sought to make clear that it was only expressing necessary views on the allegations made by the representatives in so far as they bore on the primary facts that we had to find. Since both parties had asked us to keep in mind and employ those criticisms in choosing between different factual accounts, we were obliged to deal with this. We sought not to express any view on costs, let alone a final view. On re-reading what was written I am still of the view that the Tribunal remained on the right side of the line and that the impartial observer would appreciate that.

40 The second point relates to the argument that we were inviting a costs application against Mr Sykes. This strikes me as having a considerable flaw. Mr Sykes insists that the wasted costs application is misconceived because any alleged misconduct on his part did not lead to wasted costs. These have to be compensatory and are not punitive. He has put in case law on the point. He goes further and says that he may apply to strike out the application against him for this reason. This sits uneasily with the submission that we were inviting an application. If we were doing this, we would be inviting the Respondent to make what he now says must be a hopeless application.

41 I have therefore come to the conclusion that what the tribunal said in Section 9 was acceptable, necessary to the fact-finding exercise and not tantamount to an invitation to either Claimant or Respondent to apply for wasted costs against Mr Sykes. To the extent that there are pointers to his acting unreasonably, the criticisms would be regarded by the notional objective and fair-minded observer as necessary to explain our conclusions. There is no expression of any concluded view about costs and Mr Sykes is right to submit that establishing instances of unreasonable behaviour is a necessary start for the Respondent, but does not alone get it to the costs order that is sought. The Respondent will need to establish its entitlement to a compensatory order and, even if that is met, there is a further area of discretion for the tribunal when it considers whether to make an order.

42 I turn to the telephone preliminary hearing. I have referred to what happened on 14 October at paragraphs 7 to 10 and 24 to 28. I have had to rule whether Mr Sykes's recollection is accurate and I have no doubt that he is incorrect in certain respects that I have identified. In so deciding, I have drawn on my own recollection and notes, but I have also looked with care at what has been said by the Respondent and also Mr Bryan, who was in attendance on the telephone on 14 October. Perhaps more significant is the response to a letter from the tribunal of 18 October that asked in neutral terms for the parties to make

"any response they wish to Mr Sykes's letter." No response came from the Claimant. On 18 October, the Respondent's solicitor replied in a detailed letter, three paragraphs of which take issue with Mr Sykes's account of the telephone conversation. I will not cite the detail but these paragraphs broadly match my recollection.

43 Mr Bryan submits that the telephone hearing was conducted in "a balanced and temperate way." Although I cannot say, in theory, that he could not be completely mistaken about this, I am struck by the close identity between my recollection and the Respondent's, which in both cases rely on a contemporaneous note. If we are correct about what was said and the context of the remarks, a well informed and scrupulously fair observe would not see bias, and could not reasonably suspect it. It is, as on other occasions in this jurisdiction, a pity that there is no digital recording of hearings, but I have to do the best with the available material. To accede to the application would involve acceptance of an inaccurate factual account. In particular, I would have to accept that I indicated that I thought that a wasted costs order in the sum of £20,000 should be awarded. My judgment is that no impartial observer could have reasonably formed that impression. As to this and the other points that have been urged, I am satisfied that the grounds for apparent bias, and recusal, are not met here.

44 As to the way forward, this Judgment will be sent to the parties and I would invite their further proposals. It may be that a further 4 days needs to be listed without delay and they may wish to send in their dates to avoid.

Employment Judge Pearl
22 February 2017