Appeal No. UKEAT/0157/11/ZT
UKEAT/0158/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 27 September 2012
Judgment handed down on 1 November 2012

Before

THE HONOURABLE MR JUSTICE WILKIE

MR I EZEKIEL

DR K MOHANTY JP

MS U BHARDWAJ APPELLANT

FDA & OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SANDHYA DREW (of Counsel) Instructed by: DWF Bridgewater Place Water Lane Leeds LS11 5DY
For the Respondents	MR MOHINDERPAL SETHI (of Counsel) Instructed by: Messrs Russell Jones & Walker (Part of Slater & Gordon Lawyers) 50-52 Chancery Lane London WC2A 1HL

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

Although one of the circumstances complained of may have required the Employment Tribunal members to have recused themselves on grounds of "apparent bias", had such an application been made, in fact, the agreement of the parties, including the Appellant, that the hearing should continue, notwithstanding the revelation of those circumstances, was effective to act as a waiver of any such "apparent bias" and so the hearing of the claims by the ET, as then constituted, was lawful and effective.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. These are appeals against the judgment of the Employment Tribunal at London Central promulgated on 17 September 2010 and a refusal to review the Judgment. This hearing is concerned with allegations of apparent bias and a further ground of appeal based on procedural irregularity.

2. The apparent bias ground concerns the fact that two of the Respondents to the Appellant's claim, Ms Crighton and Mr Whiteman, had been offered appointments as members of the Employment Tribunal shortly before the hearing began and were appointed as members after the hearing had begun. In addition, Mr Whiteman had some contact with one of the Lay Members of the Tribunal in the context of training for Employment Tribunal members on a date when the hearing, though continuing, was adjourned.

3. The procedural ground concerns the extent to which decisions were taken concerning the above issue of apparent bias to which the Lay Members were not parties and, if so, their significance.

Factual matrix

4. The Appellant is a practising barrister called in 1985. Between January 2005 and July 2011 she was employed by the CPS as a Crown Prosecutor. She is of Indian national origin and is a member of the First Division Association (FDA).

5. She began discrimination proceedings against the CPS in December 2005 which the FDA declined to support. That claim was settled in January 2007 on terms which were satisfactory to the Appellant.

6. She began proceedings in June 2007 against the FDA for its lack of support in her case against the CPS. Those were settled in January 2008 for a sum of £7,500 and a number of agreed measures, aimed at advancing the representation of black and minority ethnic members in the FDA.

7. By 2008 the Appellant had become a Trade Union representative with FDA. Her relationship with FDA representatives in the London branch deteriorated. There came a time when the Appellant was suspended from the London branch. In December 2008 she issued proceedings against the FDA for racial discrimination and unjustified discipline by her union. Those proceedings were also issued against Ms Crighton and Mr Whiteman, being London branch members, as well as two other officials of the union (Mr Sampson and Ms O'Toole). In June 2009 proceedings were commenced against the FDA and Sue Gethin, a national officer. Before the Employment Tribunal, Ms Crighton, Mr Sampson and Ms O'Toole were represented by Ms Alice Mayhew of counsel instructed by Simpson Millar. Meanwhile, FDA, Mr Whiteman and Ms Gethin were represented by Mr Mohinderpal Sethi instructed by Russell Jones & Walker.

8. The hearing before the Employment Tribunal began on 5 March 2010. The 5 and 8 March were treated as reading days. Evidence began to be heard on 9 March. It ran through, more or less on consecutive days, until 26 March. There were then 4 days of evidence between the 6 and 9 July. On 12 July written submissions were considered. On 14 July oral submissions

were made. The Tribunal considered its decision on the 15, 16, 19 July and on the 10 September 2010. The reasons were signed on the 17 September and were sent to the parties on the 23 September. By Order of HHJ McMullen QC made on 4 October 2011, for the purposes of the appeal, all Respondents are represented by Mr Sethi.

9. All the Appellant's claims were dismissed. However, in the course of its findings of fact and determination of the issues, the Tribunal made certain critical comments in respect of Ms Crighton at paragraphs 449 – 452 of its reasons.

10. At paragraph 517 the Tribunal made findings that certain allegations made by the Appellant had been made falsely and in bad faith.

The contentions of apparent bias

11. The main proceedings were lodged on 8 December 2008 in the London South region of the Employment Tribunals. The Regional Employment Judge, Mr Hildebrand, on 7 January 2009, transferred the proceedings from the London South to the London Central region because it was known that one of the Respondents, Ms O'Toole, was a Lay Member of the London South Tribunal. This was done without reference to the parties.

12. On 5 January 2009 Ms Crighton applied to the Judicial Appointment Commission (JAC) for a position as a Lay Member of the Employment Tribunals. She informed them on the 7 January that she was a named respondent in a race discrimination complaint and, on the 11 March, the JAC informed her that they were unable to take her application forward.

13. By a case management decision of 20 March 2009 the claim was listed for hearing on 28 September 2009. On the 12 June 2009, the second proceedings were lodged against the FDA and Ms Gethin and, in August, the September hearing was vacated.

14. On 8 September 2009 both claims were consolidated and the hearing was relisted for the 5 March 2010.

15. In September 2009 there was a further competition for Lay Members of the Employment Tribunals. Ms Crighton applied on the 15 September and Mr Whiteman on 18 September. Neither of them appears to have informed the JAC that they were currently Respondents in race discrimination proceedings before the ET. Each of them, however, on 26 February 2010, received a letter offering them appointment as Lay Members. Mr Whiteman was offered an appointment as a member of the London South region of the Tribunals, whereas Ms Crighton was offered an appointment as a member of the London Central region, the region in which these proceedings were now lodged.

16. On 6 March 2010, the day after the hearing began, Ms Crighton wrote to accept the offer of appointment and, on 12 March, some 4 days into the hearing of evidence, the Ministry of Justice wrote to Ms Crighton confirming her appointment. On a date around then, the President of the ET wrote to Ms Crighton confirming details of an induction course to be held for all new lay ET members on 24 March.

17. On 16 March Mr Whiteman emailed the Ministry of Justice informing them that he was involved in an ET as a Respondent at London Central. He received a response confirming that

there was no need to alert anyone as the case was in a different region to that to which he had been appointed.

18. On the same day, 16 March, Ms Crighton wrote to the President of the ET drawing to his attention the fact that she was a Respondent to proceedings.

19. Evidence continued to be heard on the 16, 17, 18 and 19 March.

20. What happened on the 23 March 2010 is dealt with by the ET at paragraph 12.3 of its decision in the following terms:

> **"On 23rd March 2010, having recently been made aware of the fact, we raised with the parties the fact that Ann Crighton and Paul Whiteman had recently been appointed as members of the ET: Ms Crighton to sit in London Central and Mr Whiteman to London South. It had been agreed by the President they could continue with their training, but that they would not sit whilst the claim was ongoing at London Central. The parties were already aware that Paula O'Toole is appointed as a member in London South. It was agreed that this should not prevent us from hearing the matter …**
>
> **12.5 On 24th March 2010, information having been received to this effect, we indicated that Guy Davies is a member of the ET in Exeter. Mr Sutton, Counsel for the Claimant, sits in the Bristol region (which includes Exeter) but had never sat with Mr Davies. We indicated that we had come to know that one of the Claimant's witnesses Safina Haleema had been appointed as a member in London Central. It was agreed that this should not prevent us from hearing the matter."**

21. The note taken by a paralegal, attending for that purpose on behalf of the FDA, has now been disclosed. It reads as follows:

> **"Ann Crighton**
>
> **Start 10 00**
>
> **ET: discussion re PW and AC being appointed to sit on London ET. PW and AC will be able to sit in on induction but not sit until this matter is resolved. It is unfortunate that it has arisen exactly at this moment.**
>
> **AM you may need to discuss the matter with her. It should not be anything that puts her off. If any concerns arise as to the order of witnesses it can be discussed.**
>
> **MK thank you Sir**

ET we will resume at 1200 we do need time to read AC's evidence with care which we are part way through doing.

Adjourn 10.15

Resume 12.06

MK We do not object to the ET continuing with the matter."

(MK is the Claimant's counsel Mark Sutton, ET is the panel Chairman, AM is Alice Mayhew.)

22. On the 25 March, Ms Crighton gave evidence and on the 26th the case was adjourned, part heard, to be resumed on the 6 July.

23. In the meantime, on the 14 June, Ms O'Toole and Mr Whiteman attended a training day organised by and run by the London South region of the ET. Mr Carter, one of the lay members of the tribunal at London Central, attended that London South training event by way of re-arrangement, because he had not been able to attend the equivalent event run by London Central. It was, therefore, a purely fortuitous matter that Mr Carter attended the same training event on the 14 June as did Ms O'Toole and Mr Whiteman.

24. On 18 June, Mr Carter wrote to the London Central Regional Employment Judge, Ms Potter, following a telephone call to her. It reads, so far as is relevant, as follows:

"I have to inform you that on Monday 14th June 2010 attending members training at Croydon, whilst I was getting a coffee around 9:45 hours, I met Mr Paul Whiteman and we exchanged a good morning. He was about to say, when Paula O'Toole interrupted him and said, you should not be talking to me. It then clicked that both are Respondents to the above case. I immediately walked away and went to the welcome room for all assembled. Then I joined the groups, to which I discovered Mr Whiteman and I were in the same group. I immediately explained to Judge Freer I would not be able to join this group, to which I was allocated to Judge Anne Martin's group. After the group work, I explained to Judge Martin my predicament. We went to her office to try contacting the President and yourself. We then went to see Regional Judge Peter Hildebrand.

I sat out the next all assembled session in Judge Martin's office, until I was able to speak to you for advice and passed my phone to Judge Hildebrand to talk to you.

> **I then had a short lunch with all assembled and went for a walk outside, before I joined the next all assembled presentation. Then we went into the group work and I left Croydon after 1600 hours.**
>
> **I can assure you from my part, that no prejudice occurred and I deliberately kept aloof from Mr Whiteman and Ms O'Toole thereafter. I think they did the same.**
>
> **But you may feel it appropriate to draw attention of the above to President David Latham, Judge James Taylor, the Claimant and Respondents for their information."**

25. It appears that the parties were not informed about this until the 6 July when the hearing of evidence resumed.

26. There was no mention in the ET's decision about this incident or any discussion which took place at the ET hearing on the 6 July. This issue was raised by the Appellant on the 20 October 2010 in her application for review and leave to apply for review out of time. In that document, at paragraph 9, she confirmed that, in respect of the 23 March, she agreed that, after consultations with her legal advisor, she took no objection to the claim continuing to be heard by the Tribunal. She noted that a material consideration was the costs that would be involved in a fresh hearing, as she was paying for the hearing herself, and she believed that it was in its final stages. However at paragraph 11 she said as follows:

> **"At the start of the adjourned hearing on 6th July 2010 the parties were informed that one of the tribunal members, Mr Carter had conversed with the 5th Respondent at a training course in London South. The parties were also informed that the 4th Respondent had intervened in this discussion to inform Mr Carter and the 5th Respondent that they should not be talking to each other. The EJ gave no further detail or explanation about the incident. The Claimant was dismayed and concerned that 2 Respondents and a Tribunal member had attended the same gathering and even more concerned by the inter action between them, but believed that she had no choice but to continue the hearing. Again, the material consideration for the Claimant was the costs that she had already incurred and would incur if the case was reheard. The Claimant discussed the matter briefly with her representatives and no objection was taken to the tribunal continuing to hear the matter."**

27. The Appellant also commented that the events of the 6 July were not mentioned in the ET's decision.

28. The review was rejected by the Employment Judge both as a matter of substance and by reason of it being out of time. In that decision the Employment Judge says amongst other things as follows:

> **"There is one matter that I did not refer to at paragraph 12. On 6th July 2010 I informed the parties that Mr Carter had attended a training at London South ET."**

29. The Employment Judge took issue with the contention that he gave no details or explanation about the incident. He said:

> **"I took considerable care to ascertain from Mr Carter whether there had been any discussion whatsoever about the case. He informed that there had not. As there had been no discussion about the case I anticipated that the matter would not be any cause for any great concern. It was not significantly different to any situation in which there had been brief inadvertent contact between a member of a tribunal and a party.**
>
> **I explained the situation to the parties, particularly that there had been no discussion about the case. The parties raised no issue. The matter was dealt with relatively briefly. On a review of my notes I cannot find a note dealing with this particular exchange. This explains why, when I reviewed my notes to produce the judgment, I did not deal with it separately at paragraph 12 …**
>
> **The most significant issues are whether there was any discussion about the case and whether the conversation continued after Mr Carter had been made aware of who Mr Whiteman was. I made it clear to the parties that this was not the case. I have checked this with the members of the tribunal who confirm my recollection. If there was any miscommunication at the hearing, I confirm it in this response."**

30. On 8 July Mr Whiteman gave evidence. There was an issue as to whether he would be permitted to be cross examined on behalf of the Appellant about an alleged beach by FDA of terms of a compromise agreement reached in 2008 and the ET refused to permit such cross examination. Mr Whiteman continued his evidence on 9 July.

The underlying facts on the procedural issue

31. On 25 March 2011 one of the lay members of the Tribunal, Miss McIntosh, wrote to the EAT a letter in which, amongst other things, she said this:

> **"We were made aware of the 2nd Respondent's situation when she wrote to the President during the hearing to inform him. As you can imagine, her letter caused some concern. I was**

not involved in any discussion on procedure or protocol or the decision on how to continue, or not! A few days later EJ Tayler, in the Tribunal, asked if anyone else had anything to declare. This resulted in us being made aware of the other appointments people held."

32. On 8 February 2012 EJ Tayler wrote his response to that letter:

"There were two issues that arose in relation to Ms Crighton's letter of 16th March 2010, in which she referred to her appointment to sit as a member in London Central.

First there was the issue of judicial management, for the President and or Regional Employment Judge, of how to deal with Ms Crighton's position as a member.

Second, there was a judicial issue for the panel, of how to deal with the proceedings, including the issue of whether they should continue.

It appears to me that Ms McIntosh's comments demonstrate her lack of involvement in the management issue, which was not for us.

The judicial issue was dealt with by the panel. I explained to the members the situation that had arisen and agreed that we would inform the parties and give them the opportunity to consider the matter and make submissions.

I explained to the parties, in open hearing, the situation that had arisen and the management decision that had been taken at that stage (see paragraph 12.3 of the reasons), then asked for their submissions. There was an adjournment, after which the parties came back and stated that they wished us to continue with the hearing. In the light of the views of the Parties, we proceeded."

The law on apparent bias and waiver

33. The modern approach to the issue of apparent bias was stated in **re Medicaments (No 2)** [2001] 1WLR 700CA and approved in **Porter v Magill** [2001] UKHL 67, [2002] 2 AC 357 HL in the following terms:

"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."

34. In the employment law context and in the context of a party or representative also being a part time member or chairman of an ET or EAT, the same approach has been affirmed in **Lawal v Northern Spirit** [2003] ICR 856 HL.

35. The court must ascertain all the circumstances having a bearing on the suggestion that the Tribunal was biased and then ask whether those circumstances would lead a fair minded and informed observer that there was a real possibility that the Tribunal was biased.

36. In **Locabail (UK) LTD v Bayfield Properties LTD** [2000] QB 451 CA at paragraph 18 Lord Bingham CJ, giving the judgment of the court, said as follows:

> **"When applying the test of real danger or possibility … it will very often be appropriate to enquire whether the Judge knew of the matter relied upon as appearing to undermine his judicial impartiality, because if it is known that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled … If the Judge was ignorant of the allegedly disqualifying interest: there would be no real danger of bias, as no one could suppose that the Judge could be unconsciously affected by that which he knew nothing …"**

37. In **Locabail** at paragraph 21 and referring to a decision of the Constitutional Court of South Africa (**President of the Republic of South Africa and Others v South African Rugby Football and Others** [1999] BCLR 725) the Court of Appeal found force in the following observations:

> **"… The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer the justice without fear of favour; and the ability to carry out that oath by their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case which they are obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for what ever reasons, was not or will not be impartial."**

38. In **Lawal v Northern Spirit** Lord Steyn stated at 14:

> **"… It is unnecessary to delve into the characteristics to be attributed to the fair minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer can adopt a balanced approach ... a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".**

39. A party can waive an objection to the possibility of bias where he or she is aware of all the material facts and of the consequences of the choice offered to him and where he or she has been given a clear opportunity to reach an unpressured decision.

40. Finally, in relation specifically to the EAT, in **Lawal v Northern Spirit**, the House of Lords adopted the formulation of Lord Justice Pill at paragraph 39 of the decision in the Court of Appeal (where Pill LJ had dissented):

> **"The fair minded and informed lay observer would readily perceive, I have no doubt, the collegiate spirit in which the appeal tribunal operated and the degree of trust which lay members repose in the presiding Judge. It is, in my judgment, likely to diminish public confidence in the administration of justice if a Judge who enjoys that relationship with lay members, with the degree of reliance placed on his view of the law, subsequently appears before them as an advocate. The fair minded observer may rightly perceive that the litigant opposed by an advocate who is a member of the tribunal and has sat with its lay members is at a disadvantage as a result of the association. A litigant's doubt about impartiality would, for the reasons given, be a legitimate doubt. In my view the procedure does not inspire public confidence."**

Submissions and conclusions in respect of apparent bias

Ms Crighton

41. In the light of our conclusion on the argument on waiver, we are not required to decide whether a request by the Appellant that the Tribunal recuse itself because of the membership of London Central ET of Ms Crighton would have had to have been acceded to. However we are able to indicate what our view would have been had we been required to decide that issue.

42. The Appellant argues that it is clear that any such request ought to have been acceded to. The response of regional EJ Hildebrand to the fact that Ms O'Toole, a Respondent, was a lay member of the London South ET is, it is said, the clearest evidence of the proper approach. The case was immediately, and without further reference, transferred from the London South region to avoid any possibility of apparent bias.

43. Comment is also made on the fact that, as it appeared to the EJ, the position was that Ms Crighton would continue to be trained whilst the proceedings were running, even though she would not be permitted to sit until its conclusion. The question whether that information was accurate, or became inaccurate in circumstances unknown to EJ Tayler, is something with which we deal below. But it is undoubtedly the case that, as far as EJ Tayler and his colleagues were concerned, their state of mind was that Ms Crighton would continue with her training whilst the case ran, but would not sit as a member until after the case was finished.

44. The Respondents say that the facts of this case are substantially removed from **Lawal**. In **Lawal**, a person was acting as an advocate before the EAT who had previously sat, as a part time legally qualified chairman of the EAT, with the same lay members in different constitutions of the EAT. The reliance placed by lay members of the EAT upon the legal expertise of the legal qualified chairman was decided, by the House of Lords, to be such that it would reasonably appear to put a party before the EAT at a disadvantage where that person appeared as an advocate for the other side before lay members of the EAT who had previously sat with him and who had, on that occasion, placed reliance upon his legal expertise. That was said to be sufficient to cause the fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased against the party who did not have that person as an advocate.

45. In our judgment, the crucial issue on this aspect of the case is the fact that, whether in training or as a member subsequently sitting, a lay member within one of the regions may reasonably expect to sit with any of the other lay members appointed to that region. In those circumstances the lay members sitting on an ET could reasonably be expected to have a different attitude towards a person, with whom they might expect to sit as a colleague in future,

when considering their credibility or the quality of their conduct. This was the case in respect of Ms Crighton in the present case. In our judgment, a fair minded and informed observer, in these circumstances, would conclude that there was real possibility that the Tribunal members would treat such a person differently, even unconsciously, from the way they would treat somebody on the other side making allegations or criticisms. Accordingly, whilst without deciding the matter, as necessary to our decision, in our judgment, had the Appellant asked the Tribunal to recuse itself, it would have been right for it to have done so.

Waiver.

46. However, in our judgment, the Appellant waived her entitlement to ask the ET to recuse itself in circumstances where she cannot go back on that waiver.

47. There is no doubt in our minds that the Appellant reached a free and unpressured decision. It is clear from the notes of the hearing that some 15 minutes were taken to explain to the parties the circumstances as known to the Employment Judge and his members. The Appellant was then given the better part of 2 hours to consider the issue with her legal advisers. Her representative, Mr Sutton, happened not only to be highly experienced and able as a representative but also had sat as a part time Employment Judge in tribunals in a different region, so he was well aware of the implication of training arrangements and the effect that attending such events might have on the collegiality of members. Thus, the Appellant was in a position to have particularly expert advice and a substantial amount of time to consider her position. She, frankly, has said that the reason she decided to go ahead was because she was paying privately for the litigation and she had already invested a significant sum in the hearing as it had proceeded thus far. In our judgment that does not prevent her waiver having been a free and fully informed one.

48. The issue at the heart of the argument put by Ms Drew was the question whether the Appellant was aware of all the material facts. She has argued in her skeleton argument that she did not know of the existence of the contents of the letter from Ms Crighton, she had no clear understanding about the training of new lay members and contact with existing members and she was not aware that Ms Crighton had been in direct contact with the President and the Regional EJ.

49. In our judgment the Appellant was, in substance, as well informed of the circumstances of Ms Crighton as were the members of the ET. The Employment Judge, at paragraph 12.3 of the decision, set out what he knew: Ms Crighton had recently been appointed as a member of the Employment Tribunals to sit in London Central; the President had considered her case; she could continue with her training; but she would not sit whilst the claim was ongoing. In our judgment, as a matter of substance, the Appellant was aware of all the underlying circumstances, concerning the involvement of a more senior Judge and how her ability to train and/or sit as a member was, at that time, to be dealt with whilst she was a Respondent in an outstanding case.

50. In our judgment, the ground of appeal which seeks to set aside the Appellant's waiver of any apparent bias on the part of Ms Crighton must be dismissed.

Mr Whiteman

51. In our judgment, having read the letter of Mr Carter and the review decision, what happened by way of fortuitous brief contact between Mr Whiteman and Mr Carter at the

London South training event is not such as to cause a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

52. It is clear from Mr Carter's own account that direct communication was fortuitous and momentary and, as soon as he became aware of the fact that Mr Whiteman was a Respondent in a case before an ET of which he was a member, he took immediate and effective steps to remove himself from any contact with him. Not only that, he took steps, and persisted in taking steps, to try to obtain guidance from those higher in the hierarchy and he actively removed himself from possible direct contact by removing himself from the same training group into which they were, fortuitously, placed. In addition he immediately informed his Regional Employment Judge, Judge Potter of what had transpired.

53. The position of Mr Whiteman was no different on the 18 June than it had been on the 23 March. He was a Respondent before London Central ET, whilst he had been appointed a member of London South, from which the case had been transferred. In that sense he was in no different a position to Ms O'Toole. They were members of tribunals in the same region. There was no prospect of their sitting together as part of the same ET constitution alongside Mr Carter. Thus, there was no question of either Ms O'Toole or Mr Whiteman ever being judicial colleagues of Mr Carter in the prohibited sense. The risk of a fair minded perception of the possibility of unconscious bias, to which we have referred above in respect of Ms Crighton, which might be informed by the knowledge that the individual appearing before the tribunal might, at some time, sit on the same ET constitution as a current panel member, would not arise. The circumstances of the fortuitous meeting of Mr Carter and Mr Whiteman could not, in our judgment, form a basis for a perception of a real possibility of bias held by a fair minded and informed observer.

54. It follows that the question of waiver does not arise as, in our judgment, on this basis there was no apparent bias.

55. It follows that this ground of appeal is dismissed.

The procedural ground

56. This point can be succinctly put. If Ms McIntosh were correct in her letter, that she was not involved in any discussion or decision as to how to continue, or not, having been informed that Ms Crighton was a lay member of London Central tribunals whilst conducting litigation as a Respondent, then there would be a procedural irregularity. Once the full tribunal is engaged, it is said to be a procedural irregularity for the Employment Judge to take case management decisions independent of his two lay members (**Magenta Security Services v Wilkinson** [2007] UKEAT/0385/06/1501).

57. In our judgment this ground is unsupported, as a matter of fact, by the preponderance of the evidence both contemporaneous and subsequent.

58. It is clear from paragraph 12.3 of the ET's decision that the ET took no decision on whether or not to continue. That was a matter which was left to the parties. Both parties having agreed that they should continue, there was no decision for the ET to make. It is apparent that there had been other decisions taken in relation to how the Employment Tribunals should respond to the information Ms Crighton had provided: whether or not to allow her to continue her training; if so, to what extent; and whether or not she should be permitted to sit as a member pending the outcome of her case. But, as Employment Judge Tayler points out, this was not a

decision for any of the members of this ET, including him. Furthermore, from the note of the hearing, to which we have already referred, it is clear that, in the presence of the parties and all three members of the ET, the position which had been taken by higher management on the position of Ms Crighton was explained to the parties and they were given the opportunity to consider their position. All of this was done in the presence of all 3 members of the Employment Tribunal. Finally, in his document, dated February 2012, Mr Taylor explained what was dealt with by the panel. He had explained to the members the situation that had arisen and they agreed that they would inform the parties and give them the opportunity to consider the matter and make submissions. This reflects what in fact happened and that which was noted by the Respondent's note taker and is reflected in paragraph 12.3 of the ET decision.

59. In our judgment, the letter of Ms McIntosh, when placed against the contemporaneous record of what happened, does not reveal any arguable "**Magenta**" point. It follows that this point of appeal too is dismissed.

Other matters

60. Some considerable time and effort, both on paper and orally, was taken up with investigating and making submissions about the ways in which the Employment Tribunal system dealt with the issues arising from the appointment, training and deployment of Ms Crighton, Mr Whiteman and one of the Appellant's witnesses, Ms Haleema, as lay members of the ET whilst they were parties to on-going ET claims.

Ms Crighton

61. As already mentioned, she wrote to the President of the Employment Tribunals on the 16 March 2010 acknowledging receipt of a letter confirming arrangements for her induction

course (it appears she attended this course on 24 March). In that letter she drew attention to the fact that she was a party to an ET claim and gave the case number. She indicated she was a Respondent and was denying liability.

62. On 7 May 2010 the London Central Regional Employment Judge, Ms Potter, wrote to Ms Crighton. She understood that the case had gone part heard and would not conclude for some months. On that basis the decision had been taken that Ms Crighton should not participate in the London Central region while the case was pending. That included carrying out observation days and attending regional training, although the President was content for her to be formally sworn in as a member. Ms Potter said that they should agree to liaise on the way forward once the case was concluded.

63. This was a change of approach, as she had participated in induction training on 24 March 2010. The position in respect of Ms Crighton, as of 23 March, was accurately represented by Employment Judge Tayler to the parties on that date, and it was on that basis: she would continue with her training but would not sit whilst her claim was ongoing; that the Appellant had considered, on 23 March, whether to apply for the ET to recuse itself or to waive any entitlement to make such a request and to have such request acceded to.

64. On 4 March 2011 the Appellant provided an affidavit in support of her appeals, as did Safina Haleema who had been a witness for the Appellant. In those affidavits an issue was raised on what was said to be a difference in treatment between Ms Haleema and Ms Crighton by the ET senior management in response to their being a party to litigation in the London Central region in which they had been appointed as lay members. On 25 March 2011 the regional secretary for London Central wrote to the Registrar of the EAT at the request of

Regional Employment Judge Potter, who had been shown the affidavits lodged on behalf of the Appellant. She was concerned that they dealt with a range of matters relating to administrative decisions taken by herself and the President of the Employment Tribunals which were outside the knowledge and responsibility of the tribunal panel which decided the case and were said not to be accurate on a number of points. She went on to say that, if the view was taken that these matters were material to the appeal, she requested the opportunity to comment on them.

65. One of the matters raised by Ms Haleema in her affidavit was the fact that there had been an email exchange between her and Regional Employment Judge Potter on 3 and 4 March 2011 in which Ms Haleema informed REJ Potter that she had been asked to provide a witness statement for the Appellant in relation to this appeal, on what was alleged to be different treatment between Ms Haleema, who had withdrawn from any tribunal activity, including training, and Mr Whiteman and Ms Crighton, who had attended training whilst parties to ET litigation.

66. On 4 March 2011 REJ Potter emailed Ms Haleema in the following terms:

> **"If you are witness summonsed by the EAT then I absolutely accept that you need to attend and give evidence, however, I do not see it as consistent with your role as a member in London Central to be volunteering evidence in support of an appeal in a case from this region whether in affidavit form or otherwise."**

67. On 20 September 2011 the Appellant's solicitors wrote to the President of the Employment Tribunals requesting an explanation of the difference in treatment between Ms Haleema, on the one hand, and Ms Crighton and Mr Whiteman on the other.

68. On 10 April 2012, at a meeting for directions held by the EAT (HHJ McMullen QC) Judge McMullen ordered that the evidence of the Claimant, relating to the email of 4 March

2011, and REJ Potter's email to Ms Crighton of 7 May 2010 be sent to REJ Potter for her comments. He required REJ Potter to produce a copy of the 4 March 2011 email. REJ Potter provided her comments and sent the email of 4 March 2011, on 13 April 2012. In the course of her account, and as far as Ms Crighton was concerned, she said as follows:

> **"8. When the judgment in the Bhardwaj case was issued there were adverse comments in it about Ms Crighton which prompted the President to request the Regional EJ from another region to investigate, to consider whether Ms Crighton was fit to continue to hold her office as a non legal member. The enquiry included consideration whether Ms Crighton had improperly delayed disclosure of her participation in the proceedings. I have not seen the enquiry report. All I know is that Ms Crighton was ultimately found fit to continue in office in early 2011.**
>
> **9. Following this enquiry result the President decided that Ms Crighton should be sworn in, permitted to attend member induction training in London East (a compulsory course for all new members), regional training in region and 6 observation days. She would not be permitted to sit on cases until the Bhardwaj case was concluded and that remains the position. Those were his decisions not mine. That is the extent to which she has been allowed to enjoy the benefits of a tribunal member in London Central.**
>
> **10. In summary, not only has Ms Crighton been precluded from sitting from the point of disclosure of her participation in the case but also her conduct in relation to the proceedings has been subject to formal disciplinary enquiry."**

69. In relation to Ms Haleema, REJ Potter said that Ms Haleema had been appointed a member in London South in March 2010 and had raised issues about accessibility and disability which led to the Presidential decision, on 8 April 2010, to appoint her to London Central. Following her transfer she arranged first observation on 12 April 2010 but, on that day, it emerged that she had brought a case against the FDA which was still part heard in that region. There was a discussion involving Ms Haleema, the President and REJ Potter on 13 April 2010, as a result of which it was agreed that Ms Haleema could go ahead with her observations and should attend the members' regional training on 17 May 2010, by which time it was hoped the decision in her case would be available, which it was. Ms Haleema had completed her observations but, by that time, the FDA had made a costs application against her. It was agreed that Ms Haleema would not start sitting until the costs application had been resolved. REJ Potter wrote and asked the President whether Ms Haleema could attend multi regional new member training in October 2010, though she had not satisfied the normal sitting requirement to

do so, and this was agreed. This was the same treatment as that afforded to Ms Crighton. The costs issue in Ms Haleema's case was settled and, in October 2010, it was agreed that she would begin to sit, although not with the Judge or members who had heard her case, which is normal practice.

Mr Whiteman

70. On 29 March 2010, Mr Whiteman emailed the London South REJ, Mr Hildebrand. They had spoken briefly about him being able to observe or sit on the tribunals as a new member. Mr Whiteman understood that it was not possible for him to do so until the London Central case was finished. He informed Mr Hildebrand that the case had gone part heard and was due to resume on 6 July for a further 8 days. He indicated that, though he understood the reasons for the immediate decision not to allow him either to sit or observe whilst the case was due to end on the 26 March, he was concerned that he would fall behind the development of his peers due to the further delay. He indicated that, whilst he would not expect to be able to sit, he would be happy to undertake other training that may assist him. Also, if the view regarding observation changed as a result of the added delay, he would be happy to undertake that.

71. On 6 April 2010 the personal secretary of the London South REJ emailed Mr Whiteman at his request saying:

"I regret there is little or anything that I can do to assist until you can observe and be trained."

72. Despite that stated position, it appears that, at some point prior to 14 June 2010, a decision was taken to permit Mr Whiteman to attend the London South training event which took place on that date, and at which he, inadvertently, came into contact with Mr Carter, who

was attending that training as he had been unable attend the compulsory annual regional members' training in London Central.

Employment Judge Tayler's account

73. On 7 March 2011 EJ Tayler was invited to respond to the matters set out in the appeal and the affidavit in support alleging bias.

74. EJ Tayler responded on 21 March 2011. He pointed out that many of the allegations in the Notices of Appeal and affidavits were not about the hearing panel but concerned others, namely the President and/or the REJ of London Central.

75. He had been provided, on 19 March 2010, with a copy of Ms Crighton's letter to the President of the 16 March. He raised it with the parties at the first opportunity on 23 March as set out in paragraph 12.3 of the judgment.

76. He did not investigate when Ms Crighton and Mr Whiteman had applied to sit as members of the ET and why they had not informed the Appellant of their applications. He had not been asked to do so. Nor did he enquire of the date of the application by Ms Haleema. He did not consider it necessary when none of the parties had asked him to do so.

77. He was unaware that Mr Carter was to attend regional training at London South. This happened fortuitously and led to interaction with Mr Whiteman which he did not consider to be of any real significance.

78. He was not aware of any protocol prohibiting attendance at training when members were involved in existing claims.

79. In response to the contention that he had failed properly to consider the financial impact on her of her requesting a recusal, he was aware of the substantial sums being spent on the claim by all parties and was concerned at its possible lack of proportion to the potential value of the claim, which was limited to an award to injury of feelings, but, other than giving the Appellant the opportunity to consider the matter with her counsel and to make any submissions she wished, he was not clear how it was suggested how he should have taken these concerns into account.

80. He had no reason to believe that any application made by the Appellant for them to recuse themselves would have been seen by him as hostile, nor that it would have counted against her. He was not clear what further information he should have supplied which he had not, nor did he consider that the Claimant was facing a fait accompli. It was an unfortunate situation, not of the making of the hearing panel. She was entitled to make any submission that she wished.

81. In relation to Mr Carter, he said that he made proper enquiries into the interaction between him and Mr Whiteman, ascertained that the interaction was very brief and there was no discussion whatever about the case.

Our conclusions on this aspect

82. We have devoted some time to unpicking the various strands of correspondence and contentions made by the parties and the responses by different Employment Judges because this is a matter which has loomed large in the course of the argument before us.

83. In our judgment, however, the arrangements made within the Employment Tribunals' administration as to how it should respond, in the three cases, to the difficulties posed when a newly appointed lay member is also embroiled in litigation in the same region, or in a neighbouring region, is not relevant to the questions we have to consider in relation to this appeal. It is clear that the positions of each of the three, Ms Crighton, Mr Whiteman and Ms Haleema were addressed largely by the President of Employment Tribunals and by their respective Regional Employment Judges and they were dealt with on an individual basis reflecting the degree to which their litigation had, or had not, been completed by relevant dates. Whilst it may be that, for each of them, the approach changed with the passage of time, none of this is, in our judgment, in any way relevant to what happened in this Employment Tribunal on 23 March 2010 and on the 6 July 2010. On each of those dates the Employment Tribunal, in our judgment, responded to the position as it then knew it to be and fully informed the parties of that situation.

84. In the case of Ms Crighton, as of 23 March 2010, it was the case that the view had been taken that she could carry on training, but that she should not sit as a member whilst the litigation was running. Subsequently, on 7 May 2010, that changed and she ceased to be involved in training. That decision had nothing to do with Employment Judge Tayler, nor did it impact in any way on the way he and his colleagues had responded to the information of which they were made aware on 23 March 2010.

85. In the case of Mr Whiteman, the Employment Tribunal was aware of the fact that he would continue with his training. They had said that on the 23 March 2010 and, as of the 6 July 2010, he had plainly attended training at which the fortuitous contact with Mr Carter had taken place. Once again the Employment Tribunal fully informed the parties of all relevant matters and the parties agreed to continue with the hearing.

86. As for Ms Haleema, there may, or may not, have been some difference in the way in which her position was dealt with as opposed to Ms Crighton and Mr Whiteman. That is not a matter for us. Furthermore, the position of the Regional Employment Judge of London Central, in relation to her volunteering to be a witness in an appeal from a decision from within her own region, post dated the ET decision and has no relevance to the appeal with which we are concerned.

87. In summary, therefore, there is nothing in relation to these issues which in any way affects our judgment that these appeals should be dismissed.

88. Following the hearing of the appeal, we received communication from the Appellant's solicitors providing a response to certain points which were made by the Respondent's counsel in argument. It had not escaped our notice that, as between the parties and their legal representatives, there was a level of combativeness which is unusual in this tribunal. We can assure the Appellant that we have not considered that any of the points, said by her solicitors to have been made by the Respondent's counsel criticising her conduct of the litigation, were of any significance in our decision on this appeal and we have not given them any weight.

Summary

89. For the reasons set out above these appeals are dismissed.