LINKS THAT MAY CAST DOUBT ON OBJECTIVITY

Mary Stacey **refreshes our memory of when a judge should, or should not, sit – in order to avoid a perception of bias – and also describes when a judge's behaviour constitutes 'a display of irrational animus amounting to prejudgment'.**

IN HIS ARTICLE 'When to sit and when not to sit', published in the Summer 2007 issue of *Tribunals*, Professor Jeremy Cooper explored a range of circumstances when a tribunal judge or member's link with a party, witness or representative appearing before them would give rise to the perception of bias.

He explained then that the key test to be applied in any case involving a possible bias challenge was laid down in the House of Lords case of *Porter v Magill* [2002] 2 AC 357 thus:

> '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.'

If such bias – whether real or apparent – is established, the decision cannot stand as it amounts to an error of law. The case will usually be remitted for a rehearing by a fresh tribunal, with all the attendant frustration, additional cost, delay and loss of confidence in the system.

This test effectively brings together in one definition the old common law test of bias with the requirement of Article 6 of the European Convention on Human Rights for an independent and impartial tribunal.

Professor Cooper looked at further decisions of the House of Lords, including *Gillies (AP) v SoS for Work and Pensions (Scotland)* [2006] UKHL 2 which found that the employment of a tribunal member by the same organisation whose decision is being challenged does not lead to automatic disqualification from sitting as a member of that panel under the 'fair-minded and informed observer' test.

He also considered the principles applying when a tribunal member becomes aware that he or she has already sat on a previous case involving the same applicant and looked at some cases in which a bias challenge was upheld by the courts.

Three years on, the law remains the same, and the article a good source of guidance for anyone looking for a clear description of the guiding principles to be applied by tribunals to ensure that objectivity and lack of bias on the adjudicating panel are guaranteed and maintained.

Upper Tribunal

More recently, however, the Upper Tribunal has given its first detailed consideration of when links between a party's representative and the tribunal give rise to apparent bias.

In SW v Secretary of State for Work and Pensions (IB)[1], the appellant's health problems arose from a violent assault which was also subject to a claim to the Criminal Injury Compensation Authority (CICA). The appellant continued to take his advice on the CICA claim from a firm of solicitors which his representative had left in acrimonious circumstances, taking many of her clients with her, including the appellant in respect of the current incapacity benefit claim.

The appellant had challenged a decision to withdraw his incapacity benefit. The First-tier Tribunal had dismissed that appeal. He then appealed to the Upper Tribunal, partly on

grounds of perception of bias, because two of the First-tier Tribunal's fee-paid tribunal judges were current or former partners in that firm of solicitors.

Three aspects were raised: that the appellant's representative was known personally to the judge of the First-tier Tribunal; that the representative had previously been an employee of the firm of solicitors where the judge was a partner; and thirdly that the judge was the senior litigation partner at the firm of solicitors for the appellant's ongoing CICA claim, and that there was therefore a conflict of interest.

Decision

Judge Wikeley noted that bias can be both actual and perceived. Drawing on the *Guide to Judicial Conduct*[2] and the Bangalore Principles of Judicial Conduct and associated commentary[3], he dismissed the first two grounds, noting that the fact of acquaintance between judge and representative is a daily fact of life in courts and tribunals. Judges should avoid frequent recusals and it is important to avoid the impression that a party (and indeed any representative) may be able to pick and choose the judge who will decide its case.

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The appellant having been a contemporaneous client of the firm at which the judge was senior litigation partner was, however, judged a different matter entirely. The Upper Tribunal concluded that the Bangalore Principle that a judge should recuse her or himself where 'the judge previously served as a lawyer or was a material witness in the matter in controversy'[4] was clear, and further developed in the commentary:

> '[A] judge who had previously been a member of such a firm or company should not sit on any cases in which the judge or the judge's former firm was directly involved in any capacity before the judge's appointment, at least for a period of time after which it is reasonable to assume that any perception of imputed knowledge is spent.'

In this case, the judge had been senior litigation partner of the firm which had then been dealing with the appellant's incapacity benefit claim; that firm was still dealing with the CICA claim which arose from the same incident; some of the medical evidence was relevant to both claims; and the judge had only left the firm four months before the appellant's hearing. Judge Wikeley's view was that a fair-minded and informed observer would be concerned about the risk of bias. The Upper Tribunal revoked the First-tier Tribunal decision and remitted it for a fresh hearing before a differently constituted panel.

Judicial behaviour

As well as these clear rules about when a judge should and should not sit, there is a second area, absent of any connection to or with the parties, in which the question of the actual or perceived bias of the tribunal judge or member may arise. This difficult area relates to judicial behaviour and has also given rise to recent case law.

It cannot be stressed too often that the integrity of the judicial system is dependent upon the confidence of its users and stakeholders. That confidence will only be maintained if it is considered that parties appearing before us will receive a fair and impartial hearing at which they can put their case to the best of their, or their representatives', ability. It matters since access to justice is central to a democratic society and a fundamental human right.

Reassuringly, the 2008 Survey of Public Attitudes towards Conduct in Public Life showed that 82 per cent of people trust judges to tell the

truth over time[5], making them the third most trusted profession, after GPs and head teachers.

However, allegations of bias continue to form part of the diet of the appellate tribunals and courts in every jurisdiction. In the words of Lord Justice Rimer, they sometimes amount 'to no more than the deployment of the fallacious proposition that i) I ought to have won; ii) I lost; iii) therefore the tribunal was biased.'[6]

Two recent cases have led to a thorough analysis of judicial behaviour during a hearing and its impact on the fairness of the subsequent decision reached. These cases are not about what constitutes judicial best practice, but when behaviour is so inappropriate that it compromises the perceived or actual fairness of a hearing.

Inappropriate noises

In *Ross v Micro Focus Ltd*[7], the behaviour of an Employment Tribunal member constituted the bias alleged by an unsuccessful claimant employee in an unfair dismissal case. The Employment Appeal Tribunal (EAT) found that the tribunal member had indeed been nodding enthusiastically, making inappropriate noises and clearly demonstrating her agreement with the chairman of the employer company during the course of his cross-examination. By contrast, she had overtly demonstrated her disapproval of the claimant's representative and unhappiness at some of his questions. When the claimant's representative sought to add new documents part way through the hearing, she was heard to say ' Ridiculous. It's just too late.' The EAT considered its task was to distinguish whether the behaviour was that of an unbiased person simply responding to the evidence as it unfolded, or a display of irrational animus amounting to prejudgment. The former is broadly acceptable, the latter is not.

Timing

A key determinant of the side of the line on which questionable behaviour will fall, is timing. In *Ross v Micro Focus Ltd*, the display occurred towards the end of the evidence, after the claimant's case and during the cross-examination of the employer's chairman. In that case the EAT held that the tribunal member's behaviour was a reasoned reaction to the evidence and arguments which she saw as unmeritorious being paraded before her, not evidence of a prematurely closed mind and the appeal was dismissed.

A contrasting example is found in *Peter Simper and Co Ltd v Cooke*[8], another decision of the EAT. During the claimant's evidence on the first day of the hearing, before the respondent had given evidence, the judge memorably said: 'How anyone can seriously come before a tribunal and make out that reasonable alternative employment had been offered I cannot imagine and neither can my colleagues.' It was the first of several similar comments and unsurprisingly the EAT considered it evidenced a prejudiced and closed mind and the decision was quashed.

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Preliminary views

What about the expression of 'preliminary' views part way through a hearing? The balancing exercise here is the need for tribunals to have freedom to manage and control their hearings efficiently and intervene appropriately, while not appearing to pre-judge. Again, timing is crucial. In *Jiminez v Southwark LBC*[9], the tribunal had given a forthright view, expressed as only provisional and to assist the parties to consider settling the case, that the respondent had treated the claimant 'appallingly', providing detailed and specific examples. The intervention was made after all the evidence, bar one minor witness, had been heard. The Court of Appeal overturned the EAT's judgment of bias, on grounds that the bulk of the evidence had been heard, the views

were only preliminary and had helped the parties prepare for their submissions. However, the practice must be approached with care.

By way of final warning, earlier this year in *Peter Michel v The Queen* [10], the Privy Council considered the interventions of a presiding judge commissioner in a criminal trial in Jersey. The judge commissioner's 273 interventions of a snide, sarcastic and profoundly disbelieving nature during the defendant's evidence led to the quashing of Mr Michel's conviction of money laundering £10 million on apparently strong evidence. Two categories of improper judicial intervention which are equally applicable in civil tribunal cases were reiterated in *Michel*:

- Where the interventions have made it really impossible for the representative to do his or her duty in properly presenting their client's case.
- Where the interventions have had the effect of preventing a witness himself from doing himself justice and telling the story in his own way.

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[1] [2010] UKUT 73 (AAC).
[2] See *www.judiciary.gov.uk*.
[3] See *www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf*. The Bangalore Principles set out certain key judicial values which were adopted by an international conference of Chief Justices in 2002. The Commentary was produced by the international Judicial Integrity Group, March 2007.
[4] Para 2.5.2.
[5] See *www.public-standards.gov.uk/OurWork/Public_Attitude_Surveys.html*.
[6] In *London Borough of Hackney v Sagnia* [UKEAT0600/03, 0135/04, 6 October 2005] para 63 Rimer J.
[7] UKEAT/0304/09.
[8] [1986] IRLR19 EAT, Gibson J.
[9] [2003] EWCA Civ 502.
[10] [2009] UKPC 41.