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EAT rules that tribunal was too quick to excuse itself following allegation of bias

By Nathan Combes

A robust and clear decision by His Honour Judge Richardson in the recent WestLB[1]appeal provides useful guidance to practitioners on the considerations that need to be taken into account following an allegation of bias which is accompanied by an application for recusal of the Employment Judge on that basis.

Mr Pan issued various claims against WestLB in the Employment Tribunal during 2010 alleging discrimination, harassment, victimisation and ultimately constructive unfair dismissal. The original hearing was listed to take place over 8 days commencing on 10 January 2011. However, for health reasons Mr Pan did not attend the first day of the final hearing where his counsel made a successful application for the remainder of the hearing to be adjourned.

Subsequently and in compliance with a direction issued by the Tribunal, the parties each instructed their own medical experts in order to try and establish the nature and extent of Mr Pan's illness. The medical experts were also instructed to consider whether Mr Pan was well enough to be able to attend a reconvened hearing. Both experts agreed that Mr Pan was genuinely ill and that he was suffering from a severe depressive order. However, the experts disagreed over the question of whether or not Mr Pan would be able to participate in the final hearing. In the end the Employment Tribunal decided that Mr Pan would be able to attend with appropriate adjustments being made. Accordingly the case was adjourned to 17 January 2011.

Unfortunately however things took a turn for the worse when Mr Pan's mental state deteriorated further and he was prevented on medical grounds from attending the first day of the reconvened hearing on Monday 17 January 2011. Unsurprisingly the hearing was adjourned for a second time (this time to July 2011).

In April 2011 and somewhat out of the blue, Mr Pan's solicitors wrote to the tribunal seeking an order that the Employment Judge (Employment Judge Wade) be excused. Mr Pan's solicitors were critical of the 'balancing exercise' that had been carried out

by the Employment Judge when the tribunal had earlier been required to decide the medical issue of whether or not Mr Pan was well enough to be able to attend the Tribunal in order to participate in the final hearing. Notably, Mr Pan's solicitors failed to comply with the requirement under rule 11(4)[2]to inform WestLB's solicitors of its application and the reasons for it. Unsurprisingly, WestLB's solicitors (having been sent a copy of Mr Pan's application by the Tribunal itself) objected to the proposal that Employment Judge Wade should recuse herself from the case. Eventually, after a further letter had been sent to the Tribunal by Mr Pan's solicitors complaining of bias, Employment Judge Wade decided to step down. In her written decision which outlined the basis for her decision, Employment Judge Wade emphasised that she was not stepping down because the grounds for recusal had been made out (she held that they hadn't) but rather because she believed that removing the existing panel from the case and substituting it for a new one would help the parties to save costs, focus on the key issues and minimise any prospect of further upset being caused to Mr Pan. Finally, in a letter sent to the parties' representatives on 5 July 2011 Employment Judge Wade went further and confirmed that arguably her decision could be viewed as the Tribunal making a 'reasonable adjustment' to facilitate Mr Pan's attendance at the final hearing.

The issue before the EAT was whether Employment Judge Wade had acted correctly when agreeing to substitute the original panel for a fresh panel at the resumed hearing (which interestingly and unusually was due to commence the day after the EAT hearing).

The EAT started by examining the Court of Appeal's guidance in Ansar[3]and concluded that it was clear from Ansar that where an objection of bias is made then the Employment Judge or Tribunal will have a duty to consider it. The EAT had no difficulty in concluding that the Employment Judge had failed to determine the application directly. The EAT confirmed that the Employment Judge:

1. should have given WestLB's solicitors the opportunity to make representations before deciding to recuse herself;

2. should not have decided the application on her own without her members; and

3. should have given appropriate weight to the important guidance set out in Ansar (which should always be the starting point in determining any application involving an allegation of bias against an Employment Judge or any Tribunal member).

Applying Ansar, the EAT found that Mr Pan's allegation of bias was completely without foundation and indicated quite strongly to Mr Pan's solicitors that they would do well to remind him of the thoughtful manner in which the Employment Judge had dealt with the procedural difficulties in the case and also the clear and obvious sympathy that the Tribunal had expressed for Mr Pan in light of his poor health. Reference was also made to Simper[4] as authority for the proposition that ordinarily decisions impacting on all three members of the Tribunal should not be taken by the Employment Judge alone. Importantly, the EAT also cited Simper as authority for the proposition that applications for recusal will generally not be appropriate in circumstances where the Tribunal is alleged to have demonstrated

bias during a case which is continuing. Quoting Peter Gibson J in the Simper case, the EAT confirmed that:

"Save in extraordinary circumstances, it cannot be right for a litigant, unhappy with what he believes to be the indications from the Tribunal as to how the case is progressing, to apply, in the middle of the case, for a re-hearing in front of another Tribunal. It is, in our view, undesirable that the Tribunal accused of giving the opinion of bias should be asked itself to adjudicate on that matter. The dissatisfied litigant should ordinarily await the decision and then, if he thinks it appropriate, he should make his dissatisfaction with the conduct of the case by the Tribunal a ground of appeal."

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[1] WestLB AGLondon Branch -v- Mr P Pan UKEAT/0308/11/DM

[2] The Employment Tribunal Rules of Procedure – Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861)

[3] *Ansar v Lloyds TSB Bank* [2006] ICR 1565 (EAT) IRLR 211 (CA)

[4] *Peter Simper & Co Ltd v Cooke (No 2)* [1986] IRLR 19

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