Case No: EA-2019-000973-LA (previously UKEAT/0038/21/LA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 October 2021

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

PROFESSOR R WERNER	**Appellant**
- and -	
UNIVERSITY OF SOUTHAMPTON	**Respondent**

- -
- -

Professor R Werner the **Appellant in person** (assisted by Miss K Mortimer)
Mr B Mitchell (University of Southampton Legal Services) for the **Respondent**

Hearing date: 15 September 2021

- -

JUDGMENT

© EAT 2021

SUMMARY

PRACTICE AND PROCEDURE

A preliminary hearing at which the respondent was granted an extension of time to enter a response was not so conducted as to create an appearance of bias, and was not unfair.

© EAT 2021

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. This is an appeal against the judgment of Employment Judge Emerton sitting at Southampton on 10 July 2019; granting the respondent an extension of time to present a response in the form of a draft delivered to the tribunal on 14 June 2019, and setting aside the employment tribunal's judgment of 5 June 2019, in which the claimant's claims against the respondent were upheld and he was awarded compensation of £3,449,328.54.

2. The claimant was appointed by the University of Southampton (the respondent) as Professor of International Banking in 2005. He resigned on 31 July 2018. The claimant submitted a claim to the employment tribunal received on 16 November 2018. At box 8.1 the claimant ticked the boxes to indicate that he was bringing claims of unfair dismissal, race discrimination, religion or belief discrimination, and for holiday pay, arrears of pay and "other payments". The claimant attached a 15 page document headed "Background and Details of Claim" that set out the narrative of his complaint. The claimant asserted that from about 2008 he had been subject to, amongst other things: obstruction to his career and loss of privileges; that three unwarranted investigations into his conduct were undertaken and that the respondent had refused to deal with his grievances. The claimant asserted that he had been constructively dismissed. A box 9.2 the claimant sought compensation of £4,375,000, on a broad-brush calculation, which represented roughly 64 times his pleaded gross annual salary of £68.333.33.

3. On 27 November 2018 the claimant sent a document titled "Supplementary Background and Details of Claim" to the employment tribunal setting out a similar narrative, but expressly asserting that the reason for his treatment was because of: his race, being German; his religion, being a believing and confessing Christian; and his belief, that banking concentration is a cancer to society.

© EAT 2021

The 5 June Rule 21 Hearing

4. The respondent did not respond to the claim within time. The matter came on for hearing before EJ Emerton on 5 June 2019. It is alleged that EJ Emerton was discourteous and demonstrated extreme scepticism about aspects of the claimant's case, and that this supports the contention that EJ Emerton has an animus against the claimant. Nonetheless, EJ Emerton gave judgment pursuant to Rule 21 of the **Employment Tribunal Rules 2013** in the claimant's favour in all of his claims save that for "other payments". This included compensation for untaken holiday on the basis that the claimant had not taken any holiday while working for the respondent. The claimant was awarded £9,931.88 for the current leave year and £128,717.10 for past leave years, and an additional £138,915.00 for loss of sabbaticals. The claimant was awarded £31,000 for injury to feelings and £27,450.00 for personal injury. All awards were subject to an ACAS uplift of 25%. The claimant was awarded compensation for discrimination to the date of the hearing in the sum of £612,421.35 and interest of £225,907.97. The claimant was awarded £1,435,095.90 for future losses. The awards were grossed up. These awards, and various other components I have not set out resulted in the total award of £3,449,328.54 (including interest). Although nearly a million pounds less that the claimant was claiming, it was, by any reckoning, a very substantial award, representing just over 50 times his gross annual salary.

The 10 July Preliminary Hearing

5. On 14 June 2019 the respondent applied pursuant to Rule 20 of the **ET Rules** for an extension of time to present a response, which would have the consequence that the judgment in the claimant's favour would be set aside. The application was considered at a Preliminary Hearing before EJ Emerton on 10 July 2019. Barbara Halliday (General Counsel and University Secretary) gave evidence for the respondent setting out her explanation of how the respondent had failed to submit a claim in time. Ms Halliday accepted that there had been a litany of errors on the part of the legal team of the respondent, including herself. They had sought and received extensions of time to submit a

© EAT 2021

response but had still managed to fail to submit a response despite reminders. EJ Emerton accepted that Ms Halliday's evidence was truthful and that the failure to submit the response was due to a series of genuine mistakes. EJ Emerton concluded that the explanation was satisfactory in the sense of being full and honest, although not in the sense of meaning that the failure to submit the response in time was "justified". He considered that the respondent had provided an explanation not an excuse. He decided that the "merits factor" was strongly in the respondent's favour because of a number of potential weaknesses in the claimant's case. He considered that the balance of prejudice favoured the respondent. EJ Emerton granted permission to the respondent to enter a response out of time and set aside his earlier judgment.

The 10 July Case Management Hearing

6. After a break the parties reconvened for a preliminary hearing for case management at which various orders were made to progress the claim. The claimant contends that EJ Emerton acted in a manner during both the preliminary hearing and preliminary hearing for case management that gave the appearance of bias. The claimant contends that EJ Emerton prevented him from properly cross-examining Ms Halliday when she gave evidence in the preliminary hearing which prevented him form having a fair hearing.

The Notices of Appeal

7. The claimant submitted a Notice of Appeal drafted by Nicholas M Siddall QC on 15 October 2019 asserting two grounds of appeal (1) misapplication of relevant legal test, and (2) apparent bias. The notice provided particulars pursuant to Paragraph 12 of the EAT Practice Direction (set out in Annex 1). The particulars were all of comments in the written judgment.

8. The claimant submitted a further document headed Supplementary Notice of Appeal dated 20 October 2019 (It appears from the Rule 3(7) letter referred to below that there were three versions – I take it that the claimant has put the final version in the bundle for this hearing). The document is not signed by counsel. The document included further particulars to support the allegation of apparent

© EAT 2021

bias (Ground 2a set out in Annex 2) most taken from the written judgment but including some particulars about the conduct of the hearing; and new grounds (3) misapplication of discretion and (4) evidential issues.

9. The appeal was considered by HHJ Martyn Barklem on the "sift" pursuant to Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) ("the **EAT Rules**"). HHJ Barklem held that there were no reasonable grounds for bringing the appeal.

The Rule 3(10) Hearing and case management in the EAT

10. The claimant made an application pursuant to Rule 3(10) **EAT Rules** which was considered at an oral hearing before HHJ Auerbach on 26 August 2020. HHJ Auerbach by an order with seal date 27 August 2020 dismissed the grounds of appeal relating to the substantive decision of the employment tribunal and adjourned the grounds of appeal alleging "procedural irregularities". The claimant has sought permission to appeal the decision to dismiss the grounds of appeal challenging the substantive decision to the Court of Appeal. The application for permission to appeal is stayed pending the outcome of this appeal. The consequence is that it is not open to the claimant to pursue complaints in this appeal about the substantive decision of the employment tribunal to extend time for the submission of the response and so to set aside the Rule 21 judgment. The claimant has sought to reopen arguments about the substantive decision in various documents he has submitted to the EAT but accepted, when I explained that I could only consider the grounds of appeal that HHJ Auerbach permitted to procced, that this appeal is limited to the complaints about procedural irregularities. HHJ Auerbach ordered that the claimant lodge a sworn statement or affidavit, together with those of any other witnesses on whom he relied by 23 September 2020.

11. The claimant submitted an affidavit sworn on 23 September 2020 (the key extracts potentially relevant to the grounds of appeal are at Annex 3).

12. The claimant exhibited to the affidavit a transcript of the hearings (the key extracts potentially relevant to the grounds of appeal are at Annex 4). The cross-examination of Ms Halliday was not

© EAT 2021

provided as part of the transcript. In his affidavit the claimant stated:

> I sent the required EX107 form requesting the tapes of the 10 July 2019 hearing be sent to the nominated and approved transcription company in order to obtain a transcript only of the cross-examination, as I thought, despite all the interruptions, I had sufficiently established that the witness was unreliable and had shown that important unexplained-contradictions in witness statements existed. However, Ruhina Begum, of the transcription company, stated in her e-mail to me, dated 6 September 2019, that "the witness evidence requested cannot be located on the audio". The transcript of the entire hearing of 10 July 2019, which I later ordered, and received in September 2020, did in fact omit any record of the crucial cross-examination showing the weakness of the Respondent's case. I was stunned by this specific omission by the ET (recordings exist for the time before and after, but specifically not for the cross-examination itself) of what for me is the most important documentation, which could perhaps be expected in rigged court proceedings in some countries abroad, but not in the UK.

13. It is extremely unfortunate that the cross-examination of Ms Halliday was not recorded or the recording was not retained. The claimant sees this as extremely sinister and suggests that the proceedings were "rigged". I have no reason to believe that there was anything other than an error of recording or file retention, which is not a matter over which the employment judge has any control.

14. The claimant also submitted an affidavit sworn on 23 September 2020 by :wesley john: of the family, wright. (o), (using the format of his name adopted in the jurat of the affidavit) who states he attended the hearings as a McKenzie Friend for the Appellant (the key extracts potentially relevant to the grounds of appeal are at Annex 5).

15. The matter was restored to HHJ Auerbach who ordered that:

> 1. The Grounds of Appeal relating to procedural irregularity (appearance of bias and/or unfair conduct of the hearing) are further adjourned.
>
> 2.. Copies of the Affidavits of the Appellant and Wesley Wright of 23 September 2020, together with their respective exhibits, are to be sent to the Respondent. They are to be requested to provide to the EAT, copy to the Appellant, a witness statement or statements addressing the Appellant's allegations regarding the conduct of the Judge at the hearings on 10 July 2019 and in particular in relation to the Appellant's cross-examination of Ms Halliday, together with copies of any notes made by anyone present at that hearing of that cross-examination. They are to be requested to provide these within 28 days of being sent the request.
>
> 3. Thereafter the Employment Judge is to be sent copies of the Appellant's and Mr Wright's witness statements, including the exhibits, and of all materials provided by the Respondent in reply to the request to them. The Judge is to be requested to provide his comments on the allegations of conduct relating to him, at the 5 June 2019 hearing, and

© EAT 2021

> the two hearings on 10 July 2019, together with copies of the notes of cross-examination of Ms Halliday.

16. Ms Halliday provided a witness statement dated 27 November 2020 (the key extracts potentially relevant to the grounds of appeal are at Annex 6).

17. Ms Halliday submitted a second witness statement dated 2 December 2020 exhibiting the notes of the respondent's counsel, Mr Capewell, of the public hearing of the respondent's application, delivery of the judgment and the subsequent case management hearing. She stated that she had redacted Counsel's notes to himself and annotations which are privileged.

18. EJ Emerton provided his comments on 15 December 2020. I have not attached extracts that cover the parts of the hearing on 10 July 2019 for which there is a transcript. I have limited the extracts to those that I consider relevant to appeal relating to the rule 21 hearing on 5 June 2019 and cross examination of Ms Halliday (Annex 7). I also attach EJ Emerton's notes of the cross-examination of Ms Halliday (Annex 8). They are consistent to a high degree with the [handwritten] notes of Mr Capewell and I accept that they are accurate.

19. Having considered the materials provided to the EAT, HHJ Auerbach, by an order with seal date 23 March 2021, directed that the appeal be set down for a full hearing. His reasons clearly set out the ground that he permitted to proceed and how he expected the parties to prepare for the hearing:

> 6 … The Claimant requested a hearing under rule 3(10) of the EAT's rules of procedure.
>
> 7 That came before me on 26 August 2020. I heard from the Claimant and from Mr Wright on his behalf For reasons that I gave then, I dismissed. all of the proposed Grounds of Appeal relating to the Tribunal's substantive decision.
>
> 8 However, there were also allegations of apparent bias and unfair conduct of the July 2019 hearing. Originally these allegations related to remarks or observations made by the Judge in his written decision. For reasons I gave at the Rule 3(10) hearing, I did not consider that this material alone provided a sufficient arguable basis for this aspect of the challenge to proceed. Ultimately I considered that, reviewing the material in the decision, as such, the *Porter v Magill* observer would conclude that the Judge was robustly plain speaking, but spoke as he found, and found as he did with reasonable justification.
>
> 9 However, in their final form the Claimant's allegations also include an allegation that the Judge improperly intervened in his cross-examination of Ms Halliday, both by preventing his proper questioning of the witness, and by effectively assisting the witness

© EAT 2021

in her responses. He also referred to other remarks made by the Judge during the course of the hearing, and he alleged that, in the case management discussion which followed, the Judge "exploded" at him when he raised a disclosure request.

10 I accordingly gave directions, then, and later, in October 2020, so that relevant material could be gathered to enable this aspect of matters to be considered further.

11 I have now had the benefit of reviewing affidavits of the Appellant and Mr Wright and official transcripts of those parts of the hearing that were audio recorded. I have also seen two statements from Ms. Halliday, the second exhibiting a redacted copy of the Respondent's counsel's notes. It transpired that there was no audio recording of the part of the hearing during which Ms Halliday was cross-examined, so the Judge's notes were requested and these have also been typed up. The Judge's comments on the various witness statements were also sought and have been provided.

12 In relation to the cross-examination, the issue, in short, is whether the Claimant had a fair opportunity to cross-examine Ms Halliday. In summary, she admitted that the Respondent had been severely negligent in failing to put in a response to the claim, and gave a very full account of how this came about. It was the Claimant's case, however, that she had lied about material aspects of what had happened, and that the Respondent's actions were not negligent but deliberate. The Claimant's case, on appeal, is that the Judge's conduct deprived him of a fair opportunity to put his case.

13 In light of the material that I have seen relating to the cross-examination, as such, taken on its own, I would be doubtful as to the prospects of that challenge succeeding. That material tends to suggest that the Judge was doing no more than properly managing cross-examination by a litigant in person to ensure that it stayed relevant, focussed and made reasonable progress, or, for example, intervening to give the witness a fair warning in relation to waiver of privilege.

14 However, if the Claimant was deprived of the fair opportunity to cross-examine Ms Halliday, this would, potentially, arguably render the decision unsafe. There is also, unfortunately, no audio recording, and hence no verbatim transcript, of the cross-examination. I have had regard also to the content of the transcripts of the rest of the hearing, including in particular of the exchanges between the Judge and the Claimant on the subject of the disclosure application. This is because it may be argued (by either party) that the material relating to the cross-examination of Ms Halliday needs to be put in the wider context of the transcripts relating to the overall conduct of the hearing.

15 I have concluded, in light of all the material, that there is sufficient to warrant further consideration at a full appeal hearing of the procedural irregularity ground. Such a hearing will allow a fair opportunity, for that ground to be examined, in the round, and with both sides having the opportunity to be heard before it is determined.

16 It will be important, at the full appeal hearing, for both sides' submissions, in writing and orally, and the material to which the Employment Appeal Tribunal is referred, to be focussed on that which is strictly relevant to this question, and to be proportionate. I have listed the hearing for one and a half days, on the basis that a full day will be available for oral submissions on both sides to be completed, with the next half day being for the Judge, if they feel able, to give an oral decision, although the Judge may choose to reserve their

© EAT 2021

decision, or a give an oral decision on a different date.

Preparation for the full hearing in the EAT

20. The parties were ordered to exchange and lodge with the EAT skeleton arguments for the purposes of this appeal, not less than 14 days before date of the full appeal.

21. The Order did not make provision for live evidence at the full hearing. The parties did not seek orders for live evidence to be given. Paragraph 12.5 of the EAT Practice Direction provides:

> In every case raising bias which is permitted to proceed to a FH the parties must agree (or the EAT may give appropriate directions, ordinarily on the papers after notice to the Appellant and Respondent) as to the procedure to be adopted at, and material to be provided to, the FH; including, the names of witnesses required to attend to give evidence and be cross-examined. If agreement cannot be reached, an application for directions can be made to the Registrar.

22. As neither party sought to make provision for live evidence, I take it that both parties were content for the appeal to be determined on the basis of the affidavits, witness statements and other documentation submitted to the EAT. No order was sought for the audio recording of the hearing to be provided or to played at the full appeal hearing. The appeal was listed for 14 and 15 September 2021.

23. Within the timeframe set by the Order of HHJ Auerbach, the claimant submitted two skeleton arguments. The first titled "Skeleton of skeleton argument for Court of Appeal" was written by Dr Paul Anderson and Miss Kathleen Mortimer and primarily set out arguments challenging the substantive decision of the employment tribunal to grant an extension of time. The second titled "Standards for improper conduct/procedural irregularity and for apparent bias" by Dr Anderson set out arguments as to the correct legal analysis of allegations of procedural irregularity and bias/apparent bias and the claimant's allegation in respect of the conduct of EJ Emerton.

24. On 7 September 2021 Ms Mortimer wrote to the EAT requesting the "transcript of the hearing of the above case on 10th July 2019". On 9 September 2021 the claimant sent an email to the EAT stating that Ms Mortimer would be representing him and stating that she was seeking that the EAT grant permission for "those holding an audio recording of that 10 July 2019 hearing to be released to

© EAT 2021

me and/or the EAT for the hearing".

25. On 12 September 2021, two days before the hearing, Ms Mortimer sent an email to the EAT stating:

> Please find attached my skeleton argument for the forthcoming hearing on Tuesday at the London Employment Appeal Tribunal
>
> As you know I have come to this case very late. I have sent in a skeleton argument prepared previously by Paul Anderson, however I would now like to submit my own as a supplementary one and please would you make it an urgent matter to be handed to the Judge of the hearing of the 14th September.
>
> I will be submitting more evidence as a separate bundle which the respondents have already seen in the lower employment tribunal court proceedings.
>
> Also there will be two more witnesses for the hearing including myself and Oliver Studd. the Respondents have already seen both witness statements in Disclosure.

26. A third skeleton argument was attached to the email focusing on the merits and, in particular, alleged deficiencies in the response submitted by the respondent.

27. A response was sent on 13 September 2021 by the EAT on my instructions:

> … the appeal is limited to the procedural irregularities as specifically identified at paragraph 9 of the reasons for the order of HHJ Auerbach sealed on 23 March 2021. This appeal has been subject to careful case management with specific directions as to the material that is to be considered by the Employment Appeal Tribunal at the full appeal hearing. It is not appropriate at this late stage to seek to introduce further material that is not provided for in the directions. The appeal has been prepared and skeleton arguments exchanged on the basis of the material that has been provided so far. I do not consider it would accord with the overriding objective to seek to obtain the audio recording of the hearing from the employment tribunal or to permit or to permit further material to be introduced so shortly before the appeal hearing. To do so would not place the parties on an equal footing and would risk a substantial waste of cost and the limited resources of the Employment Appeal Tribunal as it might result in the appeal being postponed. I also consider that introduction of further material would result in a loss of focus on the specific ground of appeal that have been permitted to proceed in this appeal.

28. Ms Mortimer responded that she and the claimant had not seen the Order of HHJ Auerbach and again seeking to reopen the merits appeal. A response was sent on my instruction noting that the Order of HHJ Auerbach was in the agreed bundle for the appeal hearing and that it set out the basis upon which the appeal had been permitted to proceed.

© EAT 2021

29. Later that day, 13 September 2021, Ms Mortimer wrote seeking a postponement stating that:

> I regret to write that Professor Werner is very unwell today and there is doubt he will be well enough for tomorrow's hearing. He had hoped to feel better as the day has progressed but in-fact he does not.
>
> We are therefore asking for a postponement of tomorrow's hearing as Professor Werner would like to be present to answer any questions put to him.
>
> We are very sorry to be telling you at such a late stage. Professor Werner returned from abroad yesterday and developed illness during yesterday evening that including sickness and light headedness.

30. A response was sent on my instructions:

> Ms Mortimer should attend the hearing listed for tomorrow. The application for a postponement will be considered at the outset. Ms Mortimer should consider why a postponement is said to be necessary when she is representing the appellant. It should not be necessary for the appellant to attend to answer questions from the EAT. Ms Mortimer should consider with the appellant whether he could attend by video link. The appellant should provide any medical evidence that he able to obtain to give full particulars of his condition. Ms Mortimer should be prepared to proceed with the appeal if the application for a postponement is refused.

31. Ms Mortimer sent an email to the EAT at 22.09 on 13 September 2021 stating that:

> I am writing to say that I am feeling very unwell and unable to attend the hearing tomorrow 14th September but the appellant Professor Werner, will be attending the hearing in person.

32. The Claimant attended the hearing in person on the morning of 14Septmber 2021. In response to enquiries I made as to his health the claimant stated that had suffered symptoms of sickness and fever but was feeling much better. He had not taken a Covid lateral flow test since Saturday, 3 days previously. I decided that the hearing should be converted to a video hearing to protect the health of those attending. I considered this would not disadvantage the parties as the hearing had been listed on the basis that submissions would be completed in one day. The claimant did not object.

33. On 15 September 2021 the claimant submitted a fourth skeleton argument of 30 pages. The claimant summarised his four broad "claims" as:

> I. that Emerton J's conduct in the cross-examination and on key evidence related to that cross-examination was unfair. This conduct had material, potentially decisive, bearing on the outcome of the case;

© EAT 2021

II. that the Judge failed to give adequate reasons for his decision that the Respondent's explanation for its delay was full, satisfactory and honest; and

III. that the Judge's conduct in, and on evidence related to, the cross-examination would lead fair-minded and informed observer to conclude that there was a real possibility of bias.

IV. that the court failed to secure the evidence from the cross-examination as, for an unknown reason, no audio recording and hence no transcript is available of the cross-examination.

34. I had a brief opportunity to consider the skeleton argument before the hearing commenced and noted that once again there was an attempt to go behind the Order of HHJ Auerbach and to raise complaints about the merits of the decision to grant an extension of time to the respondent to enter a response. However, I had not had an opportunity to consider the document in detail. Counsel for the respondent stated that had he not read the new skeleton in detail. I told the claimant that the appeal was limited to the grounds that HHJ Auerbach had permitted to proceed and that if consideration was to be given as to whether his new skeleton would be submitted time would be required for myself and the respondent's Counsel to read it. The claimant stated that he would not seek to rely on the fourth skeleton argument and thereafter limited his arguments to the allegation that he had been prevented from having a fair hearing because of interruptions to his cross examination of Ms Halliday and that comments made by EJ Emerton gave rise to an appearance of bias.

The Law

The distinction between appearance of bias and conduct that creates an unfair trial

35. In **Serafin v Malkiewicz and others (Media Lawyers Association intervening)** [2020] 1WLR 2455 Lord Wilson consider the distinction between an unfair hearing and the appearance of bias:

> 38 In *M & P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) the ultimately unsuccessful appellant company alleged both that the trial had been unfair and that the judge had given the appearance of bias against it. In para 31 of his judgment Hildyard J quoted the definition of bias given by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] BLR 341, para 17, as follows: "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case …" In paras 32—42 Hildyard J proceeded to analyse the interplay between the two

© EAT 2021

allegations before him. He observed that, although they overlapped, they were distinct. He added that they required appraisal from different perspectives for, while the fairness of a trial required objective judicial assessment, the appearance of bias fell to be judged through the eyes of the fair-minded and informed observer; and, in the protracted analysis of the trial judge's questionable performance which Hildyard J proceeded to undertake, he studiously paused at every point to ask (and, at the end, he considered in the round) whether it either rendered the trial unfair or would generate an appearance of bias in the eyes of that observer.

39 I have no doubt that the Court of Appeal in the present case was correct to treat the claimant's allegation as being that the trial had been unfair. We have not been addressed on the meaning of bias so it would be wise here only to assume, rather than to decide, that the quite narrow definition of it offered by Leggatt LJ and quoted by Hildyard J is correct. On that assumption it is far from clear that the observer would consider that the judge had given an appearance of bias. A painstaking reading of the full transcripts of the evidence given over 4½ days strongly suggests that, in so far as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources.

Unfair hearing

36. In **Serafin** Lord Wilson analysed the authorities considering what constitutes an unfair hearing:

40 The leading authority on inquiry into the unfairness of a trial remains the judgment of the Court of Appeal, delivered on its behalf by Denning LJ, in *Jones v National Coal Board* [1957] 2 QB 55. There, unusually, both sides complained that the extent of the judge's interventions had prevented them from properly putting their cases. The court upheld their complaints. At p 65 it stressed in particular that "interventions should be as infrequent as possible when the witness is under cross-examination" because "the very gist of cross-examination lies in the unbroken sequence of question and answer" and because the cross-examiner is "at a grave disadvantage if he is prevented from following a preconceived line of inquiry".

41 In *Southwark London Borough Council v Kofi-Adu* [2006] HLR 33, Jonathan Parker LJ, giving the judgment of the Court of Appeal, suggested at paras 145 and 146 that trial judges nowadays tended to be much more proactive and interventionist than when the Jones case was decided and that the observations of Denning LJ should be read in that context; but that their interventions during oral evidence (as opposed to during final submissions) continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether it rendered the trial unfair.

42 In *Michel v The Queen* [2010] 1 WLR 879, it was a criminal conviction which had to be set aside because, by his numerous interventions, a commissioner in Jersey had himself cross-examined the witnesses and made obvious his profound disbelief in the validity of the defence case. Lord Brown of Eaton-under-Heywood JSC, delivering the judgment of the Privy Council, observed at para 31: "The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the

© EAT 2021

> evidence, applies no less to civil litigation than to criminal trials."
>
> 43 The distinction, drawn expressly or impliedly in all three of the cases last cited, between interventions during the evidence and those during final submissions was stressed by Hildyard J in para 223 of his judgment in the *M & P Enterprises (London) Ltd* case [2018] EWHC 2665 (Ch), cited in para 38 above. He suggested at para 225 that, upon entry into final submissions, the trial had in effect entered the adjudication stage. …
>
> All that need here be said is that, where a transcript exists, it is not the present practice of appellate courts to invite the judge to comment; but that the absence of his ability to comment places upon them a requirement to analyse the evidence punctiliously. …
>
> Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly. …

37. In **Abdul Hadi Jemaldeen v A-Z Law Solicitors** [2012] EWCA 1431 Lord Justice Munby considered the extent to which intervention in cross examination may be appropriate:

> 21. In support of his case in relation to interruption Mr Chowdhary relies upon the classic judgment of Denning LJ giving the judgment of the court (Denning, Romer and Parker LJJ) in *Jones v National Coal Board* [1957] 2 QB 55.
>
> 22. Ordinary civil proceedings in this country – it is well recognised that family proceedings are very different – are adversarial not inquisitorial. The duty of the judge is to hear and determine the issues raised by the parties as set out in the pleadings.
> But, as Denning LJ observed (page 63), the judge
>
>> "is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law".
>
> 23. In pursuit of that fundamental objective the judge is not required to sit silent as the sphinx. Appropriate intervention while a witness is giving evidence, even while the witness is being cross-examined, is not merely permissible but may be vital. As Denning LJ put it (page 63):
>
>> "No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries."

© EAT 2021

He continued (page 64):

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate".

24. So there is nothing objectionable, for example, in a judge intervening from time to time to make sure that he has understood what the witness is saying, to clear up points that have been left obscure, to make sure that he has correctly understood the technical detail, to see that the advocates behave themselves, to protect a witness from misleading or harassing questions, or to move the trial along at an appropriate pace by excluding irrelevancies and discouraging repetition. Indeed, it is, as Denning LJ recognised (page 65) his duty to do so.

25. But there is, of course, a difficult and delicate balance to be held. The judge must not, as it is often put, descend into the arena. Denning LJ referred (page 63) to Lord Greene MR, who in Yuill v Yuill [1945] P 15, 20, had: "explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".

Denning LJ continued (page 64) that it is for the advocate to make his case;

> "as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost."

26. The dangers of inappropriate intervention are particularly acute during cross-examination. As Denning LJ explained (page 65):

> "Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. *Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination*. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for atone and the same time

© EAT 2021

> it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return (emphasis added)."
> …

> 28. At the end of the day, the question for us comes down to this. Adopting what Denning LJ said in Jones (page 61): Was justice done between these parties? Were the facts properly found by the judge on a fair trial between the parties? As he added (page 67):
>
> > "There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge."

38. The authorities that consider the extent to which intervention in cross-examination is compatible with a fair trial are generally taken from court proceedings in which parties are represented. I accept that they are applicable to proceedings in the employment tribunal as a matter of general principle. In particular, an employment judge should not intervene in cross-examination to an extent that constitutes entering into the arena. The exhortation to keep interruptions in cross examination to the minimum is tempered to some extent by the tendency of judges these days to be a little more interventionalist to ensure cross-examination is limited to that necessary to properly determine the case in compliance with the overriding objective, and in the employment tribunal by the fact that proceedings are subject to rule 41 of the **ET Rules**:

> 41. General
>
> The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. [emphasis added]

39. That rule may provide context to the statement by Kirkwood J in **Zurich Insurance Co v Gulson** [1998] IRLR 118:

> A party does not have an absolute right to cross-examine come what may. The tribunal has a discretion as to the conduct of the proceedings before it in this regard.

40. While an employment judge should take careful heed of the advice given in the Equal Treatment Bench Book concerning litigants in person, the tribunal is entitled to ensure that there is

© EAT 2021

not undue repetition in cross-examination, that questions are focussed on the issues and that witnesses are not harassed by cross-examination of undue length and unnecessary hostility. Litigants in person are not trained in cross-examination. This may result in greater intervention than would be necessary in the case of a professional advocate, to ensure that questions are clear, focussed on the issues in dispute and not unduly repetitious. The judge must also ensure that a witness has a fair opportunity to answer the allegation made against them and are themselves treated in a respectful manner. Fairness applied to witnesses as well as to litigants in person.

41. Robust case management may be necessary to ensure a fair hearing, rather than be indicative of an unfair hearing. Seeking to ensure that the parties stick to the issues and do not put unnecessary and/or excessive material before the tribunal is not unfair.: **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374, Lewison LJ at para 33

> The ET itself commented in this case that much of the evidence that it heard was irrelevant to the issues it had to decide. But irrelevant evidence should be identified at the case management stage and excised. It should not be allowed to clutter up a hearing and distract from the real issues. The ET has power to do this and should not hesitate to use it. The ET also has power to prevent irrelevant cross-examination and, again, should not hesitate to exercise that power. If the parties have failed in their duty to assist the tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs and, at least in the case of the employer, detracting from his primary concern, namely to run his business. An appellate court or tribunal (whether the EAT or this court) should, wherever legally possible, uphold robust but fair case management decision … [emphasis added]

42. Mummery LJ stated:

> ETs, practitioners and users alike should take note to heed the constructive comments of Lewison LJ's judgment paragraph 33. As Langstaff J said in the EAT judgment, this case has 'a considerable procedural history.' Much of the evidence given at the first hearing was of little or no relevance to unfair dismissal, which was the only claim. The ETs are responsible for ruling on what is relevant and what is irrelevant. The parties and their representatives are under a duty to co-operate with the ETs by sticking to relevant issues, evidence and law. The ETs are not obliged to read acres of irrelevant materials nor do they have to listen, day in and day out, to pointless accusations or discursive recollections which do not advance the case. On the contrary, the ETs should use their wide-ranging case management powers, both before and at the hearing, to exclude what is irrelevant from the hearing and to do what they can to prevent the parties from wasting time and money and from swamping the ET with documents and oral evidence that have no bearing, or only a marginal bearing, on the real issues.

© EAT 2021

Apparent Bias

43. The leading authority on the test to be applied in considering whether apparent bias is established is **Porter v Magill** [2002] 2 AC 357, Lord Hope of Craighead at paragraph 103:

> 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

44. The fair-minded and informed observer is to be distinguished from the litigants: **Harb v Aziz** [2016] EWCA Civ 55:

> But the litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.

45. **Porter v Magill** explains how to assess if apparent bias is made out, but does not define what constitutes bias. In **Serafin** Lord Wilson assumed, rather than decided, that the quite narrow definition of bias offered by Leggatt LJ in **Bubbles & Wine Ltd v Lusha** [2018] BLR 341, para 17 "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case . . ." was correct.

46. The authorities suggest that pre-judgment is also a form of bias. The claimant relied on **Otkritie International Investment Management Ltd v Urumov** [2014] EWCA Civ 1315 in which Longmore LJ stated that:

> It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see *Porter v Magill* [2002] 2 AC357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case.

47. This type of bias was considered by HHJ Richardson in **RBS v Wilson** (UKEAT/0363/08/CEA 24 June 2009):

© EAT 2021

> 34. We do not accept Mr Sadiq's submission that the language is indicative of apparent bias. As we shall see, the type of apparent bias which is alleged in this case is the demonstration of a closed mind during the hearing. There is no suggestion that the Tribunal evinced any bias towards the Bank by reason of its identity or by reason of its business as a bank. A Tribunal is expected to keep an open mind while it conducts a hearing and to avoid giving the appearance of a closed mind. But when a Tribunal reaches its conclusions, it is entitled – and indeed maybe bound – to express its findings and reasons in a manner which is critical of one or even both parties. To do so does not of itself demonstrate that a Tribunal evinced a closed mind during the hearing.

48. A judge is not expected to remain completely silent to avoid it appearing that the case has been prejudged: **Arab Monetary Fund v Hashim and Others** [1993] 6 Adm LR 348 (Court of Appeal 28 April 1993), Sir Thomas Bingham MR:

> In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be.

49. An employment judge may express preliminary views and may point to weaknesses in a case as a component of active case management: **Hussain v Nottinghamshire Healthcare NHS Trust**, HHJ Eady QC:

> 40. Having due regard to the full context, I am satisfied this is not a case where the ET impermissibly stepped over the line. A court or tribunal must be able to give guidance to parties as to how their case or conduct might be viewed and the risks they might be taking if they continue down a particular path; in certain circumstances, not to do so could itself be considered a failure to try to ensure a level playing field. At the same time, of course, the tribunal must be careful not to reach a conclusion as to whether the case or conduct in issue should in fact be viewed in any particular way before it has had the opportunity to hear from both sides on the point.
>
> 41. The ET in the present case did suggest that the Claimant might focus on whether certain of his claims now had any prospect of success. That was not, however, the statement of a concluded view that those claims did not have any prospect of success, but an urging that the Claimant reflect on his position given the evidence; the ET was not saying it had concluded the claims had no prospect of success but was asking the Claimant - who should have been in a better position to assess the merits of his own claims, given

© EAT 2021

> that he would have been more familiar with the further evidence that was to come than the ET was at that stage - to himself reflect on the question. It is right that the ET went on to observe that which was by then apparent to it on the Claimant's own evidence - that it had come apart in cross-examination and by reference to the documentation he had been taken to - but that was an observation made against a background of concerns as to how the Claimant was putting his case - concerns that had been expressed at various stages in the ET proceedings - and as to whether he had understood what he needed to establish (see paragraphs 5, 8, 11 and 12 of the ET's Liability Decision). It was further limited to that which the ET had by then heard and about which it was able to form a provisional view. In context, it was an observation that properly arose out of the ET's attempt to case manage the hearing and no more.

50. Robust language, even if it goes well beyond good judicial practice, does not necessarily demonstrate apparent bias: **Ross v Micro Focus Ltd** UKEAT/0304/09; Burton J:

> 13. Robust language by a tribunal is not of itself objectionable nor of itself founds a case of bias. In the judgment of the Court of Appeal (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] IRLR 96, the Court stated at paragraph 25 that *"the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely upon a party or a witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection"*. There are examples of cases where intemperate language by an employment tribunal chairman (*Kennedy v Commissioner of Police of the Metropolis* [19090] TLR 709), the asking by a tribunal member of aggressive questions (*Docherty v Strathkelvin D.C.* [1994] SLT 1064) and a vituperative exchange between a tribunal chairman and a party's Counsel (*Egerton v Rentokill Initial Management Services Ltd* EAT/141/98 22 January 1999) have not been adjudged by appellate tribunals to found a case of bias. …
>
> <u>However, there is in our judgment a substantial difference between falling below the standard set by appropriate guidelines for professional judging, breach of which would or could amount to discourtesy, and would unnecessarily add to what is already the strain and stress of a court hearing, and evidence of bias</u>. The question is whether such an obvious display, by body language, of approval of what a witness was saying is, notwithstanding the authorities referred to above, sufficient to evidence a closed mind, that is a mind which is made up not, as in *Peter Simper*, at a stage right at the outset of the hearing, but at least at a stage, though well into the hearing, materially before its conclusion. [emphasis added]

51. It might be thought odd, if a judge has used language that falls below the standard and appropriate guidelines for professional judges, that the judgment could stand. The reason is that justice must be done to both parties. If the reality is that excessively robust language did not, in fact, give rise to an appearance of bias or prevent a fair hearing it would be unjust to the other party should the judgment be set aside despite being sound, notwithstanding intemperate language used by the

© EAT 2021

judge. A party should be able to rely on a judgment and should not be put to the cost of the matter being determined afresh if the original judgment was validly made.

Overlap

52. As Hildyard J noted in **M&P Enterprises (London) Limited v Norfolk Square (Northern Section) Limited** [2018] EWHC 2665 (Ch) there is a degree of potential overlap between judicial conduct that causes substantive unfairness and that which creates an appearance of bias:

> 32. Although for the purpose of analysis, and in conformity with the observation in Kofi Adu, I have sought to distinguish the two categories (actual unfairness and the appearance of bias), there is often an interplay between them: the symptoms of unfairness being also often likely to encourage a perception of bias. Put another way, the manifestations of a Judge's failure to discharge his judicial function may also be such that a fair minded and informed observer would conclude that there was a real possibility of bias.
>
> 33. However, in that second context the court adopts the role or mantle of a fair-minded informed observer in order to assess whether, even if the evidence is not such as to require the Court to conclude that the judge did fail to discharge his judicial function so that the trial was unfair, nevertheless the way the trial was conducted would have led such an informed observer to conclude that there was a real possibility of bias.

Analysis

The Judgment

53. EJ Emerton summarised the claimant's submissions and noted that the claimant was questioning the respondent's explanation for the failure to submit the response in time:

> 63. In his oral submissions , the claimant summarised many of his written submissions and supporting documentation, and reiterated his argument that the respondent's explanation for the delay was questionable, that the balance prejudice should lead to the application being refused, taking into account the overriding objective. The claimant had not received a " massive windfall ," and the tribunal should be avoiding delay. He doubted the accuracy of the assertions made in the ET3. … The claimant explained that he had complied with all orders and the respondent had not. The response was now 133 days late and this was inequality between the parties. The respondent had had reminders which it had ignored, whilst the claimant had done all that was required of him. The respondent was seriously negligence and in serious default, and Ms Halliday had provided conflicting evidence. He questioned the integrity of the employment tribunal process, if this led to a lack of finality in litigation.

54. EJ Emerton set out his overall analysis of the evidence of Ms Halliday:

> 66. The key oral evidence was that of Ms Barbara Halliday, on behalf of the respondent. It was apparent that giving oral evidence was (unsurprisingly) an embarrassing and

© EAT 2021

> painful experience for her, as an experienced solicitor employed by the University to head up its legal functions. The tribunal has no wish unnecessarily to increase that embarrassment, but the matters which caused the embarrassment were central to the issues to be determined, and could not be avoided. That was recognised by the tribunal, as it was doubtless recognised by Ms Halliday herself. Ms Halliday's position was no doubt made more uncomfortable by the claimant's lines of cross-examination and the tone of his questioning, seeking to emphasize her (admitted) negligence and to challenge the integrity or honesty of her answers to his questions.
>
> 67. Much of Ms Halliday's evidence related to documented exchanges, and correspondence which had been ignored (or at least unactioned) by Ms Halliday and her team. She was seeking to apologise, and admit the failures, rather than to try to excuse her or her office's defaults.
>
> 68. Despite the claimant's submissions to the contrary, the tribunal found Ms Halliday's oral evidence to be truthful and straightforward, with frank answers to questions in cross-examination and from the judge. There were, needless to say, various instances where documents had been received, and where, if properly read on receipt, the respondent would have gained a better understanding of what was going on. Repeatedly pointing out instances of that, does not add weight to the claimant's case. The whole point is that the respondent had clearly rather "lost the plot" (as the tribunal would describe it) over a period of months in 2019. The claimant establishing that the respondent had failed to react to another document, does not fundamentally change the
> underlying position. Ms Halliday and her team had plainly been overwhelmed, for whatever reason; and admitted that they had not done that which, objectively, they should have done. The respondent's legal team had plainly conducted itself in a way that fell far below the standards which one would expect from legal professionals, and indeed it discloses a catalogue of failures. However, the tribunal is content to find that Ms Halliday was a witness of truth, who gave honest evidence.

55. At paragraph 70(a) to (u) EJ Emerton set out in considerable detail his findings of fact as to the failings on the part of Ms Halliday and her colleagues that resulted in the deadline for the submission of the response being misdeed. EJ Emerton accepted the respondent’s evidence that the default, while negligent, was not deliberate. EJ Emerton considered the merits of the claim, including the manner in which it had been pleaded, was relevant to his determination:

> 74. The claimant objected to the sum awarded in compensation being referred to as a "windfall", but if the respondent is right that it has a good defence to the claims, that might not be an unfair characterisation. It is also a claim which makes repeated, and serious, allegations of unlawful discrimination against a number of senior members of the University, all of which are resisted. At the rule 21 remedy hearing the tribunal needed to deal with what appeared, on the face of it, to be some extraordinary factual allegations. The fact that the tribunal felt constrained to accept the factual assertions in a rule 21 remedy judgment (when those assertions were capable of being correct) did not mean that they were all logical, or would stand much realistic chance of succeeding at a contested hearing. For example, the claimant was awarded significant compensation (with interest)

© EAT 2021

arising from his assertion that in over 14 years of employment, he had never once been permitted to take even a day's annual leave, and that at least part of the reason for that decision by the University of Southampton was because the claimant is German, is a Christian, and because of his philosophical beliefs regarding the banking industry. That allegation is really quite bizarre. It is entirely unsurprising that the respondent should wish to call evidence to show that the facts were otherwise, and to suggest that the compensation is a "windfall". Indeed, the tribunal found that the contents of the claim, despite the Regional Employment Judge's direction to provide clarity as to the discrimination claims, were unclear, not properly particularised, lacking in realism, and showed a surprising lack of intellectual focus. The claimant, in his submissions, appeared to believe that if he asserted something to be true (without providing any coherent analysis to support his conclusions), it must be so; whereas if the respondent made any factual assertions they were "mere assertions" which must be disbelieved as an attempt to mislead. To put it charitably, the claimant's assessment of his own arguments appeared at times to be lacking in self-awareness. That is not to say that there might well be some good arguments underpinning at least part of his claim, and he is of course a litigant in person, but without substantial clarification, there are many assertions where it is patently obvious that one would expect the respondent to wish to be able to call evidence to contradict.

75. There is force in Mr Capewell's underlying argument that notwithstanding serious procedural default by the respondent, justice does not require that the claimant should be permitted to keep his £3.5 million "windfall". He points out this was obtained without a full hearing on the merits of his claim, and under the adversarial system of justice a respondent with an arguable defence should be permitted to have its case heard. The tribunal considers that this is certainly a cogent starting point, but has taken into account matters in the round.

56. I shall not consider the merits of the decision to extend time as that is not the subject of this appeal. The dismissal of the appeal challenging the merits of the decision has been appealed to the Court of Appeal, where consideration of permission to appeal is to be determined after this judgment.

Grounds of appeal

Criticism of comments made in the judgment

57. The considerable majority of the grounds of appeal that have been permitted to procced in both the original Notice of Appeal dated 15 October 2019, and the Supplementary Grounds dated 20 October 2019 assert that words and comments made in the written judgment give the appearance of bias. In the original Notice of Appeal the claimant relies on EJ Emerton describing the claim as *"extreme and rather surprising", "astonishing"*, involving *"extraordinary factual allegations",* being "*really quite bizarre*", including allegations which were "*lacking in realism, and showed a surprising*

© EAT 2021

lack of intellectual focus", lacking *"particularity, clarity and logic"*; describing the claimant as *"lacking in self-awareness"*; the schedule of loss being *"infelicitously constructed"*; some of the claimant's documents being *"unfocussed, unintelligible or entirely unnecessary"*; referring to the *"weaknesses of his claims"*; the claimant's submissions being *"somewhat convoluted"*; stating that the claimant's witness statement was "*either largely irrelevant, opinion or dealt with matters which were not in dispute*"; criticising the claimants cross examination as *"seeking to emphasize her (admitted) negligence and to challenge the integrity or honesty of her answers to his questions"*; and describing the claimant's correspondence as lacking *"brevity and focus"*.

58. In the Supplementary Notice of Appeal dated 20 October 2019 the claimant refers to a number of other comments in the judgment that are said to demonstrate the appearance of bias: that *"The Claimant is a litigant in person ... who has not been able to present an adequately particularised claim"*; reference to the award to him as a *"windfall"*, that "*The claimant's case is unclear, and significant weaknesses have been identified in many parts of it. The respondent's arguments are all ones which are clear and have potential merit*" and criticising his claim while not allowing the claimant to point out errors and misleading statements in the draft response. Although there is no specific order to that effect, I take it the HHJ Auerbach accepted that this document was to be treated as forming part of the Notice of Appeal. It has not been suggested otherwise by the respondent.

59. It is important to note that all these comments were made in the judgment. I do not see how it can be properly said, robust thought they are, that they would lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased. I do not consider that such robust and critical comments could be seen by a reasonable person to show the type of bias referred to **Serafin** as "prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case". The judge clearly was highly sceptical about the legal and factual merits of the claim and was entitled to state that view as it was a relevant factor to take into account in deciding whether to grant an extension of time. I consider that

© EAT 2021

the comments were clearly related to the merits of the claim rather than demonstrating any improper animus against the claimant. While there is much to be said for judicial understatement, a claim that the claimant had not been able to take any holiday while working for the respondent, and that he was not allowed holiday because he is German, a Christian or thinks that concentration of banking is a cancer on society, was, to put it in mild terms, "surprising" and I do not consider the decision of the judge to use more forceful language would be seen by a reasonable person as indicative of bias. In considering the merits factor, the employment judge was entitled to state his determination that the claim was poorly pleaded and lacking in clarity. EJ Emerton was entitled to express the view that if the claims would not stand up if the respondent were permitted to participate in a contested hearing, the award made to the claimant could be considered to be a "windfall". I do not consider a reasonable person reading the judgment would consider that there was a real possibility of bias, but would think that this was an unusually forthright judge who spoke his mind about the merits of the case and the manner in which it had been pleaded.

60. I do not consider it is arguable that the comments in the judgment could be said to indicate the possibility of bias of the **Urumov** type, in that they demonstrate pre-judgment. The comments are made in the judgment and set out the final conclusion reached, and so are not premature.

Other grounds of appeal

61. The only ground asserting procedural irregularity in the Notice of Appeal are that comments in the judgment gave rise to an appearance of bias. In the Supplementary Notice of Appeal the claimant raises the passage in the judgment in which the EJ Emerton referred to the embarrassment caused to Ms Halliday in giving evidence about her errors and stated that: the" *tribunal has no wish unnecessarily to increase that embarrassment*". The next part of the passage from the judgment is not quoted in the Supplementary Notice of Appeal in which EJ Emerton stated "*but the matters which caused the embarrassment were central to the issues to be determined, and could not be avoided*".

© EAT 2021

62. The only additional grounds, not relying on statements made in judgment, set out in the Supplementary Notice of Appeal asserting procedural irregularity are that it is said that the appearance of bias was supported by the judge saying on a number of occasions, at unspecified stages of the hearing, words to the effect that *"You should know this, aren't you a professor?"* and *"Your claim is unintelligible."* and *"The claim is extremely muddled and unclear", "makes no sense", "intellectually incoherent", "muddled", "incoherent".*

63. The material, including the affidavit of the claimant, produced in response to the order of HHJ Auerbach considerably expand on these criticisms. There has been no express amendment to the Notice of Appeal. In permitting the appeal to proceed to a full hearing HHJ Auerbach referred to the claimant's allegations "*in their final form*" including allegations that "*the Judge improperly intervened in his cross-examination of Ms Halliday, both by preventing his proper questioning of the witness, and by effectively assisting the witness in her responses*", and in relation to "*other remarks made by the Judge during the course of the hearing"* and that "*the Judge "exploded" at him when he raised a disclosure request*". Reading the reasons of HHJ Auerbach it is apparent that he considered there were arguable grounds that the claimant did not have a *"fair opportunity to cross-examine Ms Halliday"* and that comments made during the hearing, including the alleged "explosion" when the claimant raised disclosure, formed a component of the alleged procedural irregularity. There is a limited reference to comments made during the hearing in the Supplementary Notice of Appeal, including some that are taken from the section of the transcript when the claimant raised disclosure during the case management hearing. There is no specific reference to the claimant having been prevented form having a fair opportunity to cross-examine Ms Halliday, although there is reference to the comment in the judgment of not having wished unnecessarily to increase her embarrassment. Despite there not having been a specific amendment to add interruption of cross examination as a ground of appeal it is apparent that HHJ Auerbach permitted that allegation to proceed to the full hearing, and both the claimant and the respondent have made their submissions in the appeal on that

© EAT 2021

basis. There is no specific ground of appeal in respect of the Rule 21 hearing or the preliminary hearing for case management.

The relevant stages

64. The grounds of appeal extract comments made during a number of stages of the proceedings. I consider it is important to analyse the matter by considering what was said or done at the different stages. I consider it is helpful to consider:

a. The Rule 21 hearing (no transcript)

b. The 10 July preliminary hearing, consisting of:

i. The hearing before the evidence of Ms Halliday (transcript)

ii. The evidence of Ms Halliday (no transcript)

iii. The hearing after the evidence of Ms Halliday (transcript)

c. The 10July preliminary hearing for case management (transcript)

65. Where there is a transcript that has been the focus of my analysis and I have not taken account of the comments of EJ Emerton in accordance with the normal approach to such appeals referred to in **Serafin**. For those stages for which there is no transcript, I have considered the totality of the material.

66. I have reached all of my conclusions after a consideration of all of the material and have considered whether what was said or done at any of the stages should inform my view about the other stages and, in particular, whether taken as a whole there is an appearance of bias or I should conclude that the claimant did not have a fair opportunity to cross-examine Ms Halliday so that he did not have a fair hearing. For clarity, I have given my conclusions on each stage, within that context.

Rule 21 hearing

67. There is no specific ground of appeal about this hearing. The evidence about the Rule 21 Hearing is said to support the allegation of apparent bias. Where a respondent has failed to enter a response Rule 21 of the **ET Rules** provides that:

© EAT 2021

> 21.— Effect of non-presentation or rejection of response, or case not contested
>
> (1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.
>
> (2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. …
>
> (3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

68. Rule 21 judgments are sometimes, erroneously, referred to a default judgments. They are not automatic and require the judge to consider the "*available material*" to decide whether a "*a determination can properly be made*" and may require that a hearing is fixed. Where a hearing is held the judge should reach such determination as is appropriate on the available material, including any evidence provided by the claimant. It is far from easy dealing with Rule 21 hearings, particularly in substantial cases. It can be very difficult to determine what judgment should properly be made having heard only one side of the story. There may be evidence about which the judge is rightly sceptical. Rule 41 gives the employment judge considerable leeway to test the asserted claims and evidence to seek to ensure that a judgment is properly made. However, a judge will often have little choice but to accept evidence that raises an eyebrow, but is unchallenged. It is regrettable that often there is little, if any, case management before a Rule 21 hearing. This can result in the employment judge facing the additional difficulty of being presented with a large amount of documentation with very limited time in which to read it.

69. During the course of the Rule 21 Hearing the claimant contends that EJ Emerton was "*unfriendly and very impatient*", adopted a "*hostile tone, physical expressions and attitude*" and "*exhaled and sighed loudly a number of times*". I do not find that these generalised allegation are of any real assistance in determining whether there was conduct that give rise to the appearance of bias,

© EAT 2021

as they might equally have resulted from being presented with 5 lever arch files of the paper and a detailed updated schedule of loss, and having to deal with claims the judge thought would probably not succeed if challenged, and because of the high level of compensation sought.

70. Mr Wright states he recalls in particular EJ Emerton asked the claimant to clarify his claim in respect of annual leave stating in a loud voice and with a hostile tone that it *"makes no sense"*, is *"extreme and rather surprising"* and *"quite bizarre"*. Tone is notoriously open to interpretation and may often seem hostile if what is being asserted is questioned. While the words used are forceful, the holiday pay claim was surprising in that it rested on two inherently unlikely assertions (1) that the claimant had not been allowed any holiday while working for the respondent, and (2) that this was because he is German, Christian and/or believes that banking concentration is a cancer on society. A judge is entitled to test implausible claims when asserted, even at a Rule 21 Hearing, and may do so in robust terms.

71. Mr Wright alleges that EJ Emerton made inappropriate comments about the merits of the claim; stating the claim *"would not stand much realistic chance of succeeding at a contested hearing"*, was *"very weak"*, included "*extraordinary factual allegations*", which *"could not stand"* and were *"unintelligible"*. Although it appears that the judge used forceful language, I do not consider it indicates more that that he was sceptical about the claims which he found difficult to follow and wished to test before determining them, and potentially making a very substantial award in favour of the claimant.

72. Both the claimant and Mr Wright state that EJ Emerton made comments along the lines of *"come on, you are an intelligent man, aren't you"* and *"you should know this, aren't you a professor"*. I consider that such comments are unhelpful, although they are of a type that used to be common when a judge was seeking to get a witness to concentrate and not give an unconsidered response. However, I do not accept that they resulted in an appearance of bias.

© EAT 2021

73. Standing back and looking at the Rule 21 hearing overall, I do not consider that the fair-minded and informed observer would consider that there was a real possibility that the tribunal was biased in the sense of being prejudiced against the claimant, or his case, for reasons unconnected with their legal or factual merits. The comments were about the judge's concerns about the merits of the claim and the surprisingly large award of compensation the claimant sought. I do not consider that the fair-minded and informed observer would consider there was a real possibility of bias in the form of prejudgment, but would conclude that the judge was robustly, even if in rather excessively forceful language, seeking to test the claim before making an award of damages to the claimant.

74. That is my conclusion irrespective of the eventual judgment that was made. I also consider that the fair-minded and informed observer should be taken to have stayed to the end of the hearing and heard the judgment given, and then have considered the facts. The judgment was in favour of the claimant in nearly every aspect of his claim, including the total loss of holiday pay claim. He was awarded£3,449,328.54. This would have been likely to assuage any possible doubt about whether the judge might be biased against the claimant. While I appreciate that in the context of fair hearings it was said by Lord Reed PSC during the hearing of **Serafin** that "a judgment which results from an unfair trial is written in water", see paragraph 49, I do not consider the same approach applies where it is asserted that there was an appearance of bias in the form of pre-judgment a claimant if the judgment in fact goes in favour of the claimant. Of course, a claimant is unlikely to assert an appearance of bias by way of prejudgment in a case that was won, and indeed there is no challenge to the determination at the Rule 21 hearing. I take it that the claimant accepts he was awarded all he could reasonably have expected. The allegation here is that the comments made at the Rule 21 hearing support his allegations of bias at the preliminary hearing. I do not accept that assertion is made out. If anything, the comments made at the Rule 21 hearing suggest that EJ Emerton could be direct, arguably to the point of rudeness, and not have pre-judged the claim.

© EAT 2021

The 10 of July preliminary hearing

The hearing before the evidence of Ms Halliday

75. I will comment in the next section on the part of the transcript where there was discussion about the cross-examination of Ms Halliday.

76. Referring to a letter sent to the Vice Chancellor of the University EJ Emerton said *"My gosh, it is a very long letter"*, and after questioning its relevance and the possibility of it being without prejudice *"Well I do not wish to be given any document that is not relevant because I have not got the time to spend all day and all night and all tomorrow reading matters that are irrelevant to my decision"* (Extract 4).

77. I can see nothing in this section of the transcript that would give the appearance of bias to a fair-minded and informed observer. It is no more than a robust statement of the importance of focusing on what is relevant.

The cross-examination of Ms Halliday

78. The most difficult aspect of this appeal is the cross-examination of Ms Halliday. It is extremely unfortunate that there is no transcript of the cross-examination. However, as stated above, I have no reason to believe that this is other than as a result of an error on the part of the court staff or the recording equipment. The court staff deal with recording, rather than the judge. There can be no valid criticism of the judge for the fact that the cross examination of Ms Halliday was not recorded or the recording was not retained.

79. I consider that the best evidence I have of the cross-examination of Ms Halliday are the notes EJ Emerton took. They are consistent to a high degree with the handwritten notes of Mr Capewell, that were exhibited to the second affidavit of Ms Halliday. In addition, I have the comments that are made in the affidavits of the claimant and Mr Wright. The claimant exhibited his notes of the judgment given orally by EJ Emerton, but there are no handwritten notes of the cross-examination. That is not surprising as it is difficult to take notes while cross-examining. Mr Wright attached his

© EAT 2021

handwritten notes of the case management hearing that took place after the preliminary hearing, but there are no handwritten notes of the cross-examination.

80. The claimant's affidavit is a little misleading as it starts by setting out comments that were made by EJ Emerton in the subsequent case management hearing. It might be read as suggesting they were made during the preliminary hearing as they are set out in the paragraph before the claimant goes on to consider his cross-examination of Ms Halliday.

81. It is clear from reading the witness statement that Ms Halliday provided for the preliminary hearing that she accepted that there was a catalogue of errors on the part of the respondent's legal team, including herself. She put forward what EJ Emerton described in his oral judgment as being an *"explanation"* rather than an *"excuse"* for the respondent's failure to submit a response within time. In such circumstances it is understandable that EJ Emerton decided that cross-examination should be focused on any proper challenge to the evidence of Ms Halliday, rather than merely reiterating what EJ Emerton described as admitted negligence on the part of Ms Halliday.

82. It is clear from the extracts of the transcript dealing with discussions about the management of the preliminary hearing that the claimant explained that he had documents designed to set out the extent of the failings of Ms Halliday and her team, including a schedule of what he described as reminders received by the respondent that no response had been filed, reminders about the listing of the remedy hearing and annotated screenshots designed to show read receipts of email sent to Miss Halliday.

83. It appears from Extracts 1 and 2 of Annex 4, that EJ Emerton sought to understand the basis upon which Ms Halliday would be cross-examined, seeking to avoid excessive cross-examination to establish what was already admitted, that there had been numerous of errors on the part of the respondent, which meant that correspondence that should have triggered a realisation that a response had not been submitted was missed.

© EAT 2021

84. EJ Emerton at Extract 1 asked the claimant whether he would be cross-examining Ms Halliday on the basis that she was not telling the truth. The claimant stated in a rather Delphic manner *"there seems to be less plausibility in some of the statements than the alternative"*. At Extract 2, EJ Emerton noted that it appeared to be accepted that the matter had not been properly handed and therefore he doubted that there would be much assistance to be gained by trawling through every single letter. He noted that it was accepted that the respondent's administration fell short of what would be expected. The claimant said he wished to point out contradictions that would *"make it more probable that perhaps we haven't been told the full truth"*. EJ Emerton stated that the claimant's assertion could be put to the witnessing in cross-examination.

85. To analyse whether a fair hearing did not take place because the claimant was prevented from properly cross-examining Ms Halliday, it is necessary to consider the criticisms that the claimant wished to put to her. The claimant said that he wanted to cross-examine Ms Halliday to challenge the truthfulness of her evidence, but without indicating any positive case he wished to advance. He may have wanted to keep his powder dry for cross-examination. The claimant told me that he wanted to put to Ms Halliday that she deliberately failed to respond to the claim within time. I asked why he thought she would have decided to miss the deadline for submission of a response, with the consequence that a rule 21 judgment was likely to be entered against the respondent. The claimant said that he had thought about the matter a great deal. He struggled to come up with an answer. He suggested, rather as he did in his oral submissions after the cross-examination of Ms Halliday (Extract 5), that Ms Halliday was seeking to cover up the fact that a decision had been made not to put in a response. He suggested that this was because it was a "hassle" and Ms Halliday was busy because she had other priorities. Alternatively he suggested that there was a decision to wait for the outcome and then have "another go". In his affidavit, the claimant states that he had wished to underline the fact that this was one of the largest claims the respondent had ever faced. This is said to explain why a deliberate decision was taken not to respond. The claimant told me that he wanted

© EAT 2021

to establish that the respondent thought that the claim was of such high value that it would be "laughed out of court" and so the respondent would not be put to the trouble of responding at all, or if was not laughed out of court, they would have an opportunity to submit a response late. Those assertions were not clarified before the cross-examination of Ms Halliday. In any event they are fundamentally lacking in plausibility. It is very hard to see how on any rational basis the respondent would deliberately choose not to submit a response to a claim for £4,500,000, knowing that a failure to do so would be likely to result in a judgment against them.

86. Moving on to consider the cross-examination itself. The claimant and Mr Wright suggest that the extent of interruptions was such that the claimant could not coherently cross-examine and seek to establish that the respondent had made a deliberate decision not to enter a response to the claim, and that EJ Emerton intervened not only to break up his cross-examination, but to answer questions for Ms Halliday.

87. The claimant contends that his cross-examination was brought to a premature close. He contends that he was pressurised into putting forward an unrealistically low time estimate, but then was not even granted that amount of time in which to cross-examine Ms Halliday. I can see nothing in Extract 3 that suggests that EJ Emerton pressurised the claimant into giving an unrealistically low time estimate. He simply asked how long the claimant intended to be in cross-examining Ms Halliday. The claimant responded that he did not know but estimated 10 to 15 minutes. EJ Emerton then agreed to 15 minutes, stating he would allow a maximum of 15 minutes, but no longer. I do not see that as anything more than robust case management. The claimant's affidavit might be taken to suggest that it was the hostility he refers to paragraph 6 that resulted in him limiting his request for time to cross-examine to 10 to 15 minutes as explained in paragraph 7, whereas, in fact, the comments made paragraph 6 are largely taken from the subsequent case management hearing. Furthermore, it is clear from EJ Emerton's notes of cross-examination, that rather than being required to conclude cross-examination in less than 15 minutes, the claimant had nearly 30 minutes. EJ Emerton's notes record

© EAT 2021

cross-examination starting at 11.40 and concluding at 12.09. The handwritten note of Mr Capewell suggest that the hearing resumed after a break at 11.35 and that shortly thereafter the cross-examination of Miss Halliday took place. Mr Capewell records the claimant being sworn at 12.08. Accordingly, it appears that the cross-examination lasted just under half an hour, nearly twice the claimant's time estimate. It is also apparent from EJ Emerton's notes that he did not bring the cross-examination to an abrupt halt. There is nothing in the note to contradict what EJ Emerton says in his comments, that the claimant did not ask for any additional time.

88. Reading the EJ Emerton's notes of cross-examination it is clear that the claimant did, in broad terms, put to Ms Halliday that she was not being truthful. Questions 1 and 2, show that the claimant put to Ms Halliday that her evidence was not believable. The claimant did put to Ms Halliday that it was the highest value claim that the respondent had faced, at least in the last 12 months, at Question 7. There is nothing to suggest that the claimant was prevented from putting to Ms Halliday that the high value of the claim in some way explained the failure to respond to it.

89. At Question 9, the claimant put to Ms Halliday that the failure to respond might be because she was giving priority to another matter. At Question 14 the claimant accused Ms Halliday of misleading the tribunal and giving excuses. To the extent that EJ Emerton did move the cross-examination along, I consider that was justified because it is implausible that the respondent would deliberately fail to respond to the claimant's claim, particularly as it was said to be of such a of such enormous value. It was an assertion EJ Emerton allowed to be put, but he was entitled to move the questioning along.

90. The claimant in his affidavit contest that he was prevented from properly putting his point that if Ms Halliday believe that she submitted a response to the employment tribunal she should have awaited an acknowledgement email. It is clear from Questions 29 to 32 that the claimant did cross-examine about those matters.

© EAT 2021

91. At Question 33, the claimant put his assertion that his claim had been ignored by Ms Halliday so that she could focus on other matters.

92. The notes do not establish that there were excessive interventions by the judge. At Question 5, the judge intervened when he thought there was a risk of privilege being breached. He was entitled to do so. At Question 20 EJ Emerton said that Ms Halliday could not comment on whether a letter was “strange”. I see nothing objectionable in that.

93. The claimant and Mr Wright contend that the judge intervened and answered questions for Miss Halliday, seeking to explain on her behalf that the respondent accepted that it had made honest mistakes. That is not apparent from the notes of cross-examination. Ms Halliday, in her witness statement, admitted a series of mistakes, so there would be nothing improper in the judge seeking to avoid repetitive questioning about admitted errors. EJ Emerton did allow cross-examination to suggest that there was some deliberate non-compliance even though the questions were not put in particularly clear terms.

94. The claimant and Mr Wright suggest that EJ Emerton made some comments to the effect that Ms Halliday should not be unnecessarily embarrassed. There is no record of this in the notes. In the amended notice of appeal the claimant gives a partial extract from paragraph 66 of the judgment in which it was stated that the tribunal had no wish to *“unnecessarily increase the embarrassment”* of Ms Halliday. However, the allegation misses the following sentence in which EJ Emerton stated that *“the matters which cause the embarrassment were central to the issues to be determined and could not be avoided”*. It is clear that the errors made by Miss Halliday were subject to cross-examination. If EJ Emerton said something to the effect that Miss Halliday should not be unnecessarily embarrassed, the quotation in Amended Notice of Appeal, it is important to note the word *“unnecessarily”*. If cross-examination appeared designed simply to rub salt into the wounds caused by the admitted negligence on the part of Ms Halliday, it would be unnecessary. EJ Emerton accepted that Ms Halliday’s conduct had to be subject to cross-examination that would cause necessary

© EAT 2021

embarrassment.

95. Taking an overview of the evidence, I conclude that the claimant was given a fair opportunity to cross examine Ms Halliday, so that the preliminary hearing was not unfair.

The submissions

96. From the transcript of the submissions after the evidence of Ms Halliday it is clear from Extract 5 that the claimant did assert that the respondent had deliberately decided not to respond to the claim. It was an allegation that the judge considered, but rejected.

97. Mr Wright criticises EJ Emerton for saying, Extract 6 *"maybe I'm just being stupid"*. It is clear from the extract that the claimant was asserting that he was in some way prejudiced because he had not received reminders, whereas the respondent had. EJ Emerton did not understand the point the claimant was making. I consider that EJ Emerton was checking that he was not missing something and used the vernacular *"maybe I'm just being stupid"*.

98. Mr Wright also criticises EJ Emerton for saying during at one stage of submission *"we seem to be going round in circles here"*. I can see nothing in that statement other than the judge seeking to prevent repetitive submissions.

The preliminary hearing for case management.

99. The claimant contends that the EJ Emerton was extremely critical of him during the subsequent preliminary hearing for case management, and eventually exploded when he tentatively raised the issue of disclosure. This was a separate hearing, but I appreciate it occurred on the same day and could arguably be of relevance insofar as it indicated views that the judge may have held throughout the day. However, it is important to note that the comments made during the preliminary hearing for case management were after the judgment had been given permitting the respondent to respond out of time, the only decision under appeal.

100. It is also relevant to note that preliminary hearings for case management are held in private. This is to permit a rather more robust exchange of views than might occur at a public preliminary

© EAT 2021

hearing or a final hearing. At a preliminary hearing for case management the employment judge will seek to ascertain the nature of the claims and may give a reality check about the likely prospects of their success. Such private hearings give an opportunity for the judge to be considerably more proactive than would be the case in other types of hearing, including focus on the strengths and weaknesses of the cases. This may help the parties to see the benefits of alternative dispute resolution. EJ Emerton pushed the possibility of judicial mediation.

101. The extracts from the preliminary hearing for case management run from Extract 9 to 13, and should be read in full. It is easy to overlook the fact that judges are human beings. They can become irritated and frustrated, but are expected to keep such irritation and frustration to themselves. I consider that EJ Emerton allowed his frustration to show. He thought that the tribunal had been bombarded with excessive paperwork and that he was having to deal with a claim that was poorly particularised and faced significant challenges on the merits. He expressed himself in excessively robust terms that fell well short of judicial best practice. There is a difficult line to draw between giving a robust indication of the possible challenges a claim faces, as is appropriate in case management hearings, and doing so in such a forceful manner as to be rude to a litigant in person, who is unlikely to have taken part in such hearings frequently before, and may be overawed by the judge.

102. Having heard the oral judgment at the conclusion of the preliminary hearing, the claimant suggested that he would like some time in which to prepare for a preliminary hearing for case management on another occasion. It probably would have been much better had that been done. It was getting late in the day and it would have been a good idea to deal with case management when everyone had clearer minds. EJ Emerton was very forceful in the approach that he took to limit the amount of time that the claimant could have to prepare for the case management hearing.

103. At Extract 8, it is apparent that EJ Emerton was frustrated that the claimant was not prepared to pay for a lawyer. Litigants are entitled to represent themselves. The reality is that few, but the very

© EAT 2021

wealthy, can afford legal representation at employment tribunal hearings, if they have to fund the matter without benefit of insurance or the like. EJ Emerton should not have criticised the claimant for representing himself in such terms.

104. At Extracts 9- 11 EJ Emerton pushed the claimant to explain the nature of his case, as if he should be familiar with how constructive dismissal works, including the concept of the "last straw" and should easily be able to identify protected acts for the purposes of the victimisation complaint. It is easy for judges to forget that the terms we use every day can be confusing to a litigant in person.

105. EJ Emerton's irritation started to show clearly when criticising the claimant for not setting out such detail in his further particulars. EJ Emerton suggested at Extract 11 that the claimant should not have waited to the preliminary hearing for case management before *"bothering to tell anybody what your claim is"*. EJ Emerton's irritation was made clear by his reference to the possibility of having *"come in much harder in the open tribunal"* and criticising the claimant in very forceful terms for the *"incoherence"* of the claim.

106. While it is important that parties understand that written reasons will be published on the employment tribunal website, it is important not to appear to suggest that written reasons should not be requested, particularly as failing to seek written reasons could preclude the bringing of an appeal. At extract 12 I consider that EJ Emerton would have been wise to have been more circumspect in dealing with the issue of the publication of judgments.

107. Extract 8 to 12 are certainly at the far end of robust case management. At Extract 13 the claimant, rather tentatively, when asked if there were any other questions, raised the issue of disclosure. EJ Emerton immediately made it clear that he was unlikely to make any order for disclosure at a stage at which he felt the issues were insufficiently clarified. That is a reasonable position to adopt, and it appears that the claimant was prepared to accept it. However, as the clock moved closer to 5pm, the dyke burst and EJ Emerton's frustration with the case overflowed. The judge suggested the claimant might *"wish to spend every working hour dealing with paperwork"* but that

© EAT 2021

it was not surprising that the respondent missed things tucked away in the middle of *"long-winded rambling applications"*. He said that the claimant should be able to focus and should stop going off on *"frolics of his own"* and should not *"bombard everyone with papers"*, such as giving the judge five lever arch files to deal with at a short remedy hearing. The judge said that the claimant *"had to play by the rules"* and should not *"just throw every random thought that enters your head"*. He said *"bizarrely, you thought it, in some universe, appropriate to bombard the Tribunal with vast PDFs of documents"*. He went on to say that the administrative clerks sitting in Bristol are saying, *"do not bombard us all with this rubbish"*. EJ Emerton suggested that the claimant's disproportionate actions could end up with an award of costs against him.

108. Such comments were excessively robust and failed properly to take account of the claimant's position as a litigant in person. I see nothing in the documentation to suggest that the claimant was other thanas polite and calmly spoken as he was in the appeal hearing before me.

109. The real question I have had to consider with great care, is what to take from the fact that Judge Emerton was excessively robust during the preliminary hearing for case management. I consider that the judge's concerns clearly arose from his genuine view about the merits, the pleading of the claimant's case and the amount of documentation that the claimant was sending to the tribunal. EJ Emerton clearly had concerns about the potential underlying weaknesses of the claimant's claim. These were all matters expressly related to the merits of the case, and the preparation of it, and so do not suggest any bias unrelated to the legal or factual merits of the case. The comments do not suggest bias by way of prejudgment of the preliminary hearing issues, as the judgment already been given in the previous hearing. The claimant has not alleged that the judge's interventions made the preliminary hearing for case management unfair and there is no appeal against the orders made. What was said at the preliminary hearing for case management cannot make the previous preliminary hearing unfair.

110. While I recognise that the claimant is justifiably upset about the way in which he was spoken to by EJ Emerton at the preliminary hearing for case management, I do not consider that it should

© EAT 2021

result in overturning the decision at the previous preliminary hearing to extend time to enter a response, in circumstances in which I have found that the conduct of that hearing was not unfair and that the conduct of EJ Emerton during the preliminary hearing did not give rise to an appearance of bias. To do so would be unjust to the respondent. Accordingly, the appeal is dismissed.

© EAT 2021

Annex 1

Particulars supporting the allegation of apparent bias (ground 2) in the original Notice of Appeal

Numbers in square brackets are the paragraph numbers in the judgment

2.1. The Employment Tribunal described the Appellant's claim as *"extreme and rather surprising"* [20]. This was expanded in [74] where the Appellant's claim was described variously as involving *"extraordinary factual allegations",* an allegation which was *"really quite bizarre",* further allegations which were *"lacking in realism, and showed a surprising lack of intellectual focus".* The Appellant was described as *"lacking in self-awareness".* Further at [87] the claim was described as lacking *"particularity, clarity and logic".*

2.2 The Appellant's schedule of loss was described as *"infelicitously constructed"* [22].

2.3 The Appellant's documents were described as *"unfocussed, unintelligible or entirely unnecessary"* [23].

2.4 The Appellant's pleading of the claim was criticised [30(a)] it later being described as *"astonishing"* [88].

2.5 The tribunal unnecessarily expressed a view as regards its perception of the *"weaknesses of [the Appellant's] claims"* [51].

2.6 The Appellant's submissions were described as *"somewhat convoluted"* [61].

2.7 The Appellant's evidence was unnecessarily criticised [65] in marked contradistinction to the significant allowances made in favour of the Respondent [66, 70(c) and 70(n)].

2.8 The nature of the Claimant's questioning of the Respondent's witness was the subject of unnecessary criticism [66].

2.9 The Claimant's correspondence was the subject of unnecessary criticism being described as lacking *"brevity and focus"* [69].

© EAT 2021

Annex 2

Particulars supporting allegation of apparent bias (ground 2a) in the Supplementary Notice of Appeal

2a.1 The Employment Tribunal recorded that *"the tribunal heard oral evidence from the Claimant, which was either largely irrelevant, opinion or dealt with matters which were not in dispute"* [65] when in fact the Claimant gave no oral evidence [46].

2a.2 Notwithstanding that during cross-examination Ms Halliday *"did not, in reality, provide a very satisfactory explanation as to why the brief to Mr Capewell was never confirmed in January 2019"* [70h] the Employment Tribunal recorded that it *".found Ms Halliday* 's *oral evidence to be truthful and straightforward, with frank answers to questions in cross-examination"* [68].

2a.3 *"The Claimant is a litigant in person ... who has not been able to present an adequately particularised claim"* [76].

2a.4 Notwithstanding the *"catalogue of errors"* [81] of the Respondent, the Employment Tribunal distinctly records that it "ha[d] *no wish* [to] *unnecessarily increase ...embarrassment* [to Ms Halliday]", while in stark contrast the Employment Tribunal unnecessarily levied against the Claimant harsh and critical comments, namely:

(i) *"You should know this, aren't you a professor?"* and similar a number of times.

(ii) *"Your claim is unintelligible."*

(iii)"The claim is extremely muddled and unclear", "makes no sense", "intellectually incoherent", "muddled", "incoherent" (repeatedly), despite the same judge stating *"I accept the claims"* to each item bar one at the Remedy Hearing of 5 June.

2a5. The Employment Tribunal condoning the Respondent's terminology of the lawful award of 5 June 2019 to the Appellant by a court in England as a "windfall" implying an unjust gain [74, 75, 84].

2a6 The Employment Tribunal unnecessarily making excuses for the default of the Respondent, accepting that Respondent was busy with "a very important matter" [70j].

2a7 *"The claimant's case is unclear, and significant weaknesses have been identified in many parts of it. The respondent's arguments are all ones which are clear and have potential merit"* [93].

2a8 The Employment Tribunal made many critical comments on the Appellant's claim [87 to 93], while not critically examining the Respondent's Grounds of Resistance and giving no opportunity to the Appellant to point out errors and misleading statements therein.

© EAT 2021

Annex 3

Key extracts from the Affidavit of Professor Werner

Rule 21 hearing 5 June 2019

1. EJ Emerton was surprisingly unfriendly and very impatient with me. This was expressed, among other ways, in a hostile tone, physical expressions and attitude [4]

2. EJ Emerton made the following comments to me, which showed his bias against me: "aren't you an intelligent man?";"come on, you are an intelligent man, aren't you?"; "you should know this, aren't you a professor?". EJ Emerton made each of the comments set out above at least once, and made some of the comments more than once. I cannot remember the exact wording of all the comments made by EJ Emerton, but I do recall that throughout the hearing he was making comments to me in a similar vein to those set out in this paragraph, taunts against me personally, such as "aren't you an intelligent man?", "you should know that" and "aren't you a professor" were uttered repeatedly [5]

3. He also exhaled and sighed loudly a number of times, which I thought was him showing his impatience and ill-temper towards me [6]

4. He also mocked the calculations submitted concerning my loss, saying something like "as professor of banking and finance you should know better" - despite the fact that these had been compiled by professional employment law solicitors, as he acknowledged elsewhere [7]

Preliminary Hearing 10 July 2019

5. This experience is deeply etched in my memory as a remarkable, very dark and scary one. I think I have never been bullied, shouted at, intimidated and abused on one day In my life as much as on this day, at the hands of EJ Emerton [10]

6. EJ Emerton's conduct was ill-tempered, hostile, derogatory and dismissive. This invective was aimed at me, as a person, but also with liberal use of negative adjectives reserved to describe my ET claim, for example: EJ Emerton exclaimed my ET claim "makes no sense", is "intellectually incoherent", includes "bizarre claims", is "muddled and [has] unclear claims", is "extreme and rather surprising" involving "extraordinary factual allegations", described as "really quite bizarre", and "the discrimination claims were unclear, not properly particularised, lacking in realism, and showed a surprising lack of intellectual focus", and that my ET claim "would [not] stand much realistic chance of succeeding at a contested hearing". Taunts against me personally, for example, "as a professor you should know that" and "aren't you a professor" or "as professor you should be able to focus" or ... "you should apply some intellectual focus" were once again levied forcefully against me, accusing me of being "incoherent", "muddled", of "bizarre" behaviour, accusing me of "bombarding people with paper" or even uttering "random thoughts that enter your head" [11]

Cross-examination of Ms Halliday

7. When I had the opportunity to cross-examine the Respondent's witness, from the beginning I felt under time pressure. Somewhat intimidated by the Judge, I meekly requested 10 to 15

© EAT 2021

minutes, which was immediately insisted upon by the Judge, who then emphasised I was not going to get more than 15 minutes [16]

8. I was surprised by the numerous interruptions of my cross-examination by EJ Emerton. He intervened repeatedly in the process of the presentation and eliciting of evidence, preventing me from following a preconceived and consistent line of inquiry, and putting me/my case at a grave disadvantage [17]

9. On a number of occasions, at least two or thee times, but possibly more, when I asked BH, the witness, a question, EJ Emerton responded on her behalf. I remember that in those instances he kept stating words to the effect that the Respondent had 'simply made mistakes' and the detailed questions I asked were not important and/or the answers did not need to be heard. In other words, instead of letting me hear out the witness, EJ Emerton was responding on her behalf, denigrating my question and in effect denying me the possibility to make my intended inquiries. His behaviour indicated that he seemed to be protecting BH. later in the day he would call my cross-examination on this important topic "nit-picking" [19]

10. I wished to cross-examine BH on the following points

    a. I had prepared a chart showing the read receipts I had received from BH …

    b. I had prepared a chart on the number of times the Respondent had been sent a reminder about remedy hearing …

    c. I had prepared a chart on the number of times the Respondent had been reminded that no response had been submitted to the ET concerning my claim …

    d. I believe I asked the witness about the automatic email receipt acknowledgements sent out by the ET whenever an email is sent to the ET. Since she had claimed that she "thought" she had submitted her response to the ET in February 2019, as a professional solicitor she would be expected to wait for a few seconds for the immediate automatic acknowledgement email from ET … I believe EJ Emerton Intervened and ended this line of inquiry, asking something like "Have you got any other questions?".

    e. I asked the witness whether my claim was the largest claim at present or in the past, and she answered clearly yes, that it was. I was going to ask next why she then chose to set different priorities by focusing on other matters, as she had submitted in her witness statement, and that this choice could have consequences that the Respondent should be expected to bear. However, EJ Emerton, immediately upon BH confirming that it was the largest claim - apparently realising what my line of inquiry was going to lead to - interrupted again and diverted the discussion to another topic.

    f. I had further questions prepared, based on further evidence of contractions. For instance, I had wanted to ask BH about whether it was true that an internal investigation had been announced at the Respondent into the conduct of the legal department, and whether it was true that despite this BH had been or was about to be promoted (showing that she had not 'messed up' or 'lossed the plot', but instead pursued a deliberate strategy). I had brought copies of internal announcements by Respondent to this effect. Unfortunately, I was not given the opportunity to ask these questions as my time was cut short.

© EAT 2021

11. EJ Emerton favoured the Respondent's viewpoint entirely and without question. For instance, whenever I asked a question that raised the possibility that the Respondent had, for tactical or whatever other reasons, chosen intentionally to default and not submit a response - which was the main thrust of my cross-examination - EJ Emerton repeated the claim made by the Respondent that they had "made mistakes", even "honest mistakes", but never once was willing to entertain the notion that it could have been an intentional abuse of process. … [22]

12. After what felt for me a far too brief time - since I had been interrupted frequently and consistently by EJ Emerton and thus did not actually receive even the short 15 minutes the judge had allocated to my cross-examination - EJ Emerton cut short the examination and stated that it was inappropriate to "go through the [Respondent's] embarrassing sequence of events" (or words to that effect). [23]

13. Throughout the examination, despite this being the most Important part of the hearing for me, EJ Emerton made me feel very stressed and his interruptions served to confuse me. He prevented me from pursuing consistent lines of questioning, where a series of questions needs to be asked, by interrupting on several occasions and asking me whether I had questions on other issues, i.e. not the issue at hand. This succeeded at times in getting me off course by preventing me from asking the pertinent next question, and instead forcing me to change the topic. [24]

Preliminary hearing for case management, 10 July 2019

14. EJ Emerton seemed to dissuade me from asking for written reasons for his judgment, emphasising that they would be made public and while there would be criticism of the Respondent, he would also criticise me. [52]

15. I had written to the ET in 2019 to make an application for disclosure, and the ET replied to me on 7 May 2019 informing me to make my application at the Case Management Hearing. I therefore very carefully and politely raised the question whether and when it might be appropriate to request a certain type of disclosure from the Respondent, necessary for my case. EJ Emerton exploded in anger at me, and shouted at me and threatened me. To say that EJ Emerton pounced on me in outrage would be an understatement. It felt like he was dumping several crates of heavy bricks upon my head. By his outburst he bullied me aggressively and threatened to impose court fines or costs on me if I dared to mention 'disclosure' again. He shouted at me and accused me of wanting to embark on a "fishing expedition". He accused me of "bombarding the ET with paper", then excused the Respondent's failure to respond by blaming me, stating that it was "no wonder" they had 'overlooked' filing a response, making me responsible for their failure. [53]

16. El Emerton at that time engaged in another string of ad hominem insults, darning I was engaged in "long-winded rambling" and lacking "intellectual focus". He taunted me, saying "you as a professor" should be able to "focus your mind", suggesting I was not able to focus my mind and was "muddled". He claimed I had uttered "every random thought that comes to your head" when in fact I had not been allowed to speak very much at all on 10 July 2020. He also accused me of ignoring court orders, which was wholly wrong, and actually it was the Respondent who had done so. Again, I felt he threatened negative press coverage upon me.

© EAT 2021

Annex 4

Key extracts from the transcript

The preliminary hearing, 10 July 2019

Extract 1

JUDGE EMERTON: And what, exactly, is the status of the documents at, which is quite detailed-

DR WERNER: Yes, also there's-

JUDGE EMERTON: -at A108.

DR WERNER: Yes. I would like to rely on those too. It's a note of detailed documentation of conduct issues of the respondent and Barbara Halliday.

JUDGE EMERTON: When you say conduct issues, what do you mean by that?

DR WERNER: It has to do with the argument I shall submit to the ... To you sir, about negligence, factual inconsistencies and/or inaccuracies, omissions of facts, or evidence, and also irregularities, misleading and/or false claims of fact.

JUDGE EMERTON: False claims? False claims in where?

DR-WERNER: In the witness statement, in the submissions to the court.

JUDGE EMERTON: So you will be cross-examining-

DR WERNER: Of the respondent.

[Crosstalk]

JUDGE EMERTON: - Mrs Halliday on the basis she is not telling the truth, will you?

DR WERNER: There seems to be less plausibility in some of the statements than alterative-

[Crosstalk]

JUDGE EMERTON: Okay, well-

DR WERNER: -explanations

JUDGE EMERTON: -then that is a matter for cross-examination and you do not know what she is going to say in response but you have made submissions on it anyway, have you?

Extract 2

JUDGE EMERTON: Well I think there was, as I understand it, I think it would be possible to say the respondent's argument is essentially that they handed up, that this was not handled well and to rely

© EAT 2021

on the arguments set out in Mr Capewell's witness statement. So I doubt that I am going to be trawling through every single letter, because it does not appear to be in dispute, Dr Werner, that the ...

DR WERNER: It points to-

JUDGE EMERTON: -respondent administration fell woefully short of what would be expected.

DR WERNER: It points to the

[Crosstalk]

JUDGE EMERTON: So how will that assist your case?

DR WERNER: By pointing to contradictions which make it more probable that perhaps we haven't been told the full truth. For instance, evidence that actually the respondent had been aware and had been made aware, again and again.

JUDGE EMERTON: Okay. Well you can put that to the witness in cross-examination. If we could come onto timings. …

Extract 3

JUDGE EMERTON: How long were you expecting, or hoping to be in cross-examination of Mrs Halliday?

DR WERNER: Time-wise, I'm sorry, I have not estimated but I think, you know, there are several questions I need to ask, I would like to ask the witness. I don't know. 10, 15 minutes or ...

JUDGE EMERTON: Okay. Let us go for 10 to 15 minutes. And I may have a few questions as well, although from my preliminary reading of what the statement, it seems reasonably comprehensive but plainly you are going to raise some other issues. My initial reaction was there was nothing that I could see that was obviously missing that I would need further clarification on, but as judge, I reserve the right to clarify any matters. So, the usual procedure is the witness is sworn in, cross-examined by the other party, I will allow a maximum of 15 minutes but no longer …

Extract 4

JUDGE EMERTON: My gosh, it is a very long letter.

MR CAPEWELL: Yes. It's a letter written by Dr Werner prior to the- His resignation from his employment on 18 July to Vice Chancellor of the University and it is headed, 'Without Prejudice'. And we say that [without] prejudice privilege attaches to it but, in any event, we don't really see the relevance of it to today's application in any event, but. …

JUDGE EMERTON: Well I do not wish to be given any document that is not relevant because I have not got the time to spend all day and all night and all tomorrow reading matters that are irrelevant to my decision.

Submissions after the evidence

© EAT 2021

Extract 5

JUDGE EMERTON: Sorry what do you? What are you suggesting that the tactic was?

DR WERNER: The tactic was, I suggest, as a probable, and in fact likely explanation, to cover up the fact that a decision had been made to not put in the response because it was a lot of hassle and one was busy and one made other .. . Set other priorities, which actually is admitted. But that is procedural. ..

JUDGE EMERTON: Okay.

DR WERNER: Abuse to then wait for the result, and then oh, we don't like the result, now we're going to have another go.

JUDGE EMERTON: Yes.

DR WERNER: So this surprise- Provides significant weight for the Tribunal to exercise its discretion and sanction such failures as decisive factor. Since *5* June, actually the questionable tactics have continued. …

Extract 6

JUDGE EMERTON: Sorry I do not understand your argument. Maybe I am just being stupid but I cannot see the relevance of that to any matter I have got to decide. You are saying because you have not had reminders, you are prejudiced more than the respondent? Can you just explain that?

DR WERNER: Well I'm ... I'm saying that ...

JUDGE EMERTON: Why would it prejudice you to ... If I allowed the application?

DR WERNER: In the sense that I've done nothing wrong and I've been fully engaged. And the respondent has not, and on top of that, has actually received active reminders and forbearance and two extensions already in the past. So, in terms of the legal process, it seems it's been fairly strict on me, but quite-

JUDGE EMERTON: Well the-

DR WERNER: -supportive on-

JUDGE EMERTON: You- You were directed, were you not, to serve further and better particulars?

DR WERNER: And I did.

JUDGE EMERTON: Which were extremely unclear, and no doubt, had the response been accepted at that stage, there would have been a need for further clarification. Because ... They ... Because the pleadings were unsatisfactory.

Extract 7

DR WERNER: Well... I will move to the conclusions.

© EAT 2021

JUDGE EMERTON: We seem to be going round in circles here.

Preliminary hearing for case management, 10 July 2020

Extract 8

JUDGE EMERTON: Well if you are not prepared to pay a lawyer. if you wish to attend on your own behalf, you knew that we were going to deal with case management so you had plenty of notice of that. If you are not ready then we will go ahead. I am not planning to do anything extraordinary or unusual. I thought you were going to say you wanted five minutes or something? How long? How long were you asking for? You seem to be choosing to delay your claim when I thought it was[the essence?] of your claim you were worried by the delay. How long are you asking for?

Extract 9

JUDGE EMERTON: Well, I shall ask that question now. Dr Werner, are you in a position to clarify, are you relying on breach of the implied term of trust and confidence? Or are you not sure?

DR WERNER: You mean breach of contract? The employment contract?

JUGE EMERTON: Well. no. The constructive dismissal claim. Do you know what a constrictive dismissal claim is?

DR WERNER: In principal, although-

JUDGE EMERTON: Well you brought a claim.

DR WERNER: Yes.

JUDGE EMERTON: Do you not know what the claim is that you have brought?

DR WERNER: Yes. It is that I was prevented from doing my job, it became impossible to do my job as . ..

JUDGE EMERTON: So what is the fundamental term of contract you say was breached?

R WERNER: I was given ... I was fulfilling my duties but I was prevented from fulfilling my duties.

JUDGE EMERTON: So what do you say, what term of the contract was breached?

Extract 10

JUDGE EMERTON: Are you relying on the last straw? Are you Dr Werner. that there was some particular thing which ... Well. it is obviously the last straw as a reference to the last straw that broke the camel's back. I.e. the incident which triggers, which may, in itself not be of huge significance but triggers the resignation?

Extract 11

DR WERNER: May I clarify, protected acts? Means related to the protected characteristics?

© EAT 2021

JUDGE EMERTON: Well. ..

DR WERNER: Or is that?

JUDGE EMERTON: The victimisation claim. Do you know- You have put the claim in?

DR WERNER: Yes.

JUDGE EMERTON: As I understand it, it is not clear from the claim form, oh well unless Mr Capewell tells me he understands it, as to what the protected acts were. And if there are no protected acts, there cannot be a victimisation claim. So those will need to be-

DR WERNER: I may need advice.

JUDGE EMERTON: -specified. Okay.

DR WERNER: I may need some time to think about this.

JUDGE EMERTON: Okay. I mean this ... Yes. The best thing is actually put it in the claim and when you were asked to provide further and better particulars, to put it in that rather than to wait to this stage before bothering to tell anybody what your claim is. Okay. I could have come in much harder in the open Tribunal to say that the claim makes very little sense to me. It was sufficient evidential basis for a Rule 21 judgment but it is intellectually incoherent. it makes no sense and it does not provide the information that is needed. If you are not prepared to use a lawyer then as an experienced professor you really do need to focus, Dr Werner. on actually setting out what your claim is and applying some intellectual focus for something which is incoherent and muddled and certainly does not explain to me what the claim is. And I would not expect the Respondent to understand it either. It is not good claim form and the further and better particulars do not clarify matters. Save to say what your religion is and what your belief is. And the fact that you are German. And proud of being German. Okay. So that is the victimisation. I have now forgotten what the breach of contract claim is. …

Extract 12

JUDGE EMERTON: … So there will be a short judgment. It will be open to the parties to ask. for written reasons within 14 days of that being sent to the parties. I appreciate, Dr Werner, you may have an appeal point, I mean I think I am right but there, on the interpretation of Kwik Save v Swain, I would have thought it, I mean it is not for me to say but it is likely that the EAT would say it is all within the Tribunal's discretion, but because it is quite a large sum, you know it is- I appreciate that it is something that you might want to appeal. Personally, l do not think you are likely to succeed but that is not. .. That is not for me to say, and if you do want to appeal, obviously you are going to want to ask for written reasons. And you may want to get advice on that. but I would suggest that it is . .. It will be a public document which will criticise the respondent but will also point out that the claim is somewhat muddled and so on, it may be something that you will not want to ask for reasons unless you give thought. And I would have thought the only reason you are likely to, is if you think you might want to appeal to the Employment Appeal Tribunal. That is something that you would expect to have. So if you do ask for written reasons. I will not criticise you for it, but I would just counsel caution because it may not be helpful unless you think. or you are advised that there is a real chance of appeal and that you need some written reasons for that. .. For that purpose.

© EAT 2021

Extract 13

JUDGE EMERTON: … any other questions from either party? Yes?

DR WERNER: Yes. I have applied in the past, twice to the Tribunal that was before the preliminary. that time that should have been the preliminary hearing, for a disclosure order because-

JUDGE EMERTON: Well I fully indicated it would be very unusual for me to give a disclosure order until I know what the issues are.

DR WERNER: Sure. I see.

[Crosstalk]

JUDGE EMERTON: But what is the order you are seeking?

DR WERNER: I see. So, essentially ...

JUDGE EMERTON: Disclosure is disclosure of documents relevant to the issues which have been identified.

DR WERNER: Yes. So

JUDGE EMERTON: I am not prepared to allow what are usually known as fishing expeditions to go sailing off and putting fishing, expanding the hopes that you will catch some interesting fish. But if you tell me what it is you want, I...

DR WERNER: For instance, in my application from 5 April, I set out the reason why it is reasonable for me to ask for disclosure, particularly

JUDGE EMERTON: Of ?

DR WERNER: Of the subject access requests that I have applied for.

JUDGE EMERTON: Well if you have applied for subject access requests, that is nothing to do with the Tribunal. That does not fall within our jurisdiction. … I did not say it in open hearing, but the claim form is ladling out various bits of legislation which are completely too irrelevant to what happens in the Tribunal. It is a statute jurisdiction. There is no point in complaining about lots of bits of legislation like subject access request that has not been complied with. The Tribunal is not interested. it does not form part of our jurisdiction. If you want to make a subject access request and appeal to the information commissioner, frankly that is your business. It is not a matter that the Tribunal will get involved with. The only- You would need to ... It is now after quarter to five, I have already said that I do not save in exceptional circumstances, award disclosure until I know what the issues are.

DR WERNER: Yes.

[Crosstalk]
JUDGE EMERTON: I still do not know what the issues are,

© EAT 2021

DR WERNER: -but-

JUDGE EMERTON: So you need a pretty good reason for why I should order any disclosure. You should concentrate on actually coming up with a coherent claim, unlike the muddle[d] claim you have put in so far. once you have actually made it clear …

DR WERNER: Yes

JUDGE EMERTON: -what it is you are claiming, then at that point, the Tribunal can think about ordering disclosure in the normal way.

DR WERNER: Accepted.

JUDGE EMERTON: But we- I do not order disclosure on the basis that it might be relevant in the future to some claim which has not yet been clarified. Unless there is a very specific point that the interests of justice need to be dealt with. Okay?

DR WERNER: Thank you. Yes.

JUDGE EMERTON: It is absolutely imperative [inaudible] that the parties assist the Tribunal and the overriding objective in providing clarity, we have [been] bombarded with paper. and Dr Werner you have got an astonishing five lever arch files to a remedy hearing, this has to be approached with a degree of proportionality. You may feel you want to spend every waking hour dealing with paperwork to do with the case. It will not assist you. It causes bother for the Tribunal. it causes bother for the respondent and no wonder the respondent misses things tucked away in the middle of long-winded rambling applications because it is not clear. Dr Werner, intellectual focus, you, as an eminent professor, 1 really do expect you to be able to focus your mind on the issues. Going off on a little frolic[s] of your own on tangents, on bombarding everybody with papers and giving the judge five lever arch files to deal with a short remedy hearing is just not helpful. It is extremely unhelpful. You do need to focus in complying with orders, on clarifying the issues, litigation is not a game. You have got to play by the rules and focus on what the litigation is about. Not just throw every random thought that enters your head. That is unhelpful. It does not help your case, it makes your case look weak and muddled.

DR WERNER: Yes, sir.

JUDGE EMERTON: What you want to do is to have: a clear strong case and you have not done that so far.

DR WERNER: The letter in response from the Tribunal at the time, just to explain, said please bring that file. we are not accepting it now, please bring it on 5 June. That is why I brought it. I have a- The response from the Tribunal –

[Crosstalk]

JUDGE EMERTON: Well, no, yes. Because you ... Because bizarrely, you thought it, in some universe, appropriate to bombard the Tribunal with vast PDFs of documents.
(Crosstalk]

DR WERNER: That wasn't the intention.

© EAT 2021

JUDGE EMERTON: The Tribunal office is a bunch of administrative clerks sitting in an office in Bristol. If you give them pages and pages and pages and pages of evidence, what do you expect them to do with it? The hearing, you bring the evidence. So all they were doing is saying, do not bombard us with all this rubbish, if you want to call evidence at the hearing, bring it to the hearing. You know, what do you expect a clerk to do if you suddenly send a 100-page document? Obviously they are not going to deal with it. I mean, do not- You must apply common sense. That sort of disproportionate effect is going to end up with a costs award against you if you do that sort of thing. You know, you must apply common sense, intellectual focus and clarity. There has been precious little of that, and it is about time it started. You were very lucky that you had an award for three and a half million pounds, as I made clear at the time, and that is purely because the respondent did not respond to the claim. So there we are. It is absolutely essential that clarity is there going forwards. The respondents agreed to pay you costs. But if there is unreasonable conduct and litigation by a claimant, that results in- Will result in the respondent claiming costs against you and being awarded them. So let us keep things in proportion. Keep it simple and do not ask for disclosure on matters when we do not even know what the claim is about yet.

DR WERNER: No. Thank you sir.

JUDGE EMERTON: And you are very lucky I do not say that in from of the press because it is clearly inappropriate and unhelpful. Okay? Right, well on that happy …

© EAT 2021

Annex 5

Key extracts from the Affidavit of Wesley John Wright

Rule 21 hearing 5th June 2019

1. When Professor Werner did not provide an answer, which appeared to me that EJ Emerton thought fitting, that was when EJ Emerton said to Professor Werner things like "come on, you are an intelligent man, aren't you" and "you should know this, aren't you a professor". These phrases were said, in my opinion, in a derogatory manner; mocking even, and it then became very apparent that EJ Emerton had become hostile towards Professor Werner, which to my mind, seemed to became worse as time went on and the Remedy Hearing progressed. These aforementioned phrases were said a couple of times, probably not more than twice each [9]

2. I recall one particular example when EJ Emerton asked Professor Werner to clarify his claim concerning annual leave. Professor Werner began answering by explaining the rationale behind that claim, but before he had chance to finish explaining EJ Emerton forcefully interrupted and began saying, in a loud voice and with a hostile tone, which, to me, sounded like he was mocking Professor Werner, things like, this "makes no sense", it is "extreme and rather surprising", it really is "quite bizarre".

3. Nearing the conclusion of the first session, prior to EJ Emerton giving judgment in the second session, EJ Emerton openly expressed that Professor Werner's claim "would not stand much realistic chance of succeeding at a contested hearing". He also said that Professor Werner's claim was "very weak", and incorporated many "extraordinary factual allegations" which, in his opinion "could not stand" because they are "unintelligible". EJ Emerton made these comments again in a derogatory manner.

Preliminary Hearing 10 July 2019

4. When EJ Emerton spoke to Professor Werner, on occasions it was in a hostile manner, he butted in and retorted with questions, which to me seemed critical and not inquisitive in nature. This type of conduct became more evident laterally in the first session of the Hearing. One example was when the Respondent's representative, Mr Capewell, pointed out a without prejudice issue, concerning Professor Werner's resignation letter submitted in evidence. Rather than dealing with this matter courteously and professionally, as I had reasonably expected, EJ Emerton made adverse and striking comments; unnecessarily described the letter as "very long" and "inordinate length" and inappropriately commented, in a dismissive way, that he "had not got the time *to* spend all day and all night and all tomorrow reading matters that are irrelevant to my [(his)] decision" [18]

5. During Professor Werner's cross-examination of Barbara Halliday, EJ Emerton interrupted and intervened on numerous occasions. There were some interventions, I do not recall what particular questions these interventions were concerning, where it appeared clear to me that EJ Emerton was attempting to obtain further clarification on a particular matter. This seemed wholly appropriate and reasonable to me [20]

6. However, there were a number of other interruptions, I am afraid I do not recall how many exactly, where EJ Emerton interrupted the cross-examination, sometimes in mid flow of

© EAT 2021

Professor Werner's question and which I saw, on couple of occasions, I do not recall the precise number, that the interruption disrupted the flow of Professor Werner's questioning, whereby, as a result of one interruption Professor Werner appeared to become flummoxed and also seemed to forget what question he was asking her, I am afraid I do not remember what the question was. [21]

7. On another occasion, it appeared to me that, EJ Emerton intervened and restructured Professor Werner's question then, he directed that altered question to Barbara Halliday. The restructuring of the question, appeared to me, to change the interrogatory nature and direction of the question, it was clear that it did not assist Professor Werner's examination but conversely strongly appeared to assist Barbara Halliday and the Respondent. Professor Werner seemed bewildered by this intervention and it clearly knocked his confidence and flow, yet again. I do not recall what the precise question was, or what the question was altered to be either and I do not recall EJ Emerton providing any reason for this intervention. [22]

8. Heading towards the latter part of Professor Werner's cross-examination, he asked of Barbara Halliday some more questions, I do not recall how many, but I do recall the questions were concerning her negligence and various discrepancies in her evidence. Some of those discrepancies were also noted in a number of charts he had prepared and a document entitled ‘Detailed Documentation of Conduct Issues of the Respondent and Barbara Halliday'. This was when EJ Emerton made more frequent interruptions and interventions. There were occasions, I am not entirely sure how many, where, it seemed to me, that EJ Emerton answered some of Professor Werner's questions for Barbara Halliday; before she could answer he had intervened and instead he responded to Professor Werner's question. [23]

9. There were other occasions where EJ Emerton blocked Professor Werner from asking a question, either interrupting mid flow or interjecting directly after the question was raised, I do not recall the particular question being raised or how many interventions like this were made, save that I recall Professor Werner was attempting to ascertain and question Barbara Halliday on matters concerning negligence and discrepancies in her evidence; her witness statement, and linked matters documented in his charts and the 'Detailed Documentation of Conduct Issues of the Respondent and Barbara Halliday'. [24]

10. Where EJ Emerton either interrupted Professor Werner in mid flow of raising a question, or he intervened after the question had been raised, on occasions, I do not recall the precise amount of times save that they were unnecessarily frequent; enough to surprise and shock me, he critiqued the question, sometimes retorting .. what is the relevance" and using other phrases, which I am not able to precisely recall. However, I do recall one striking occasion when EJ Emerton stated his reasoning for such intervention which was, something similar to, .. we are not hear to embarrass the witness[(Barbara Halliday)] even more so than she already is, this is not a time to berate the witness, move on". The cross-examination then appeared to be stopped for this reason. [25]

11. EJ Emerton's hostile attitude towards Professor Werner continued through submissions. At one point, in response to Professor Werner's submissions concerning prejudice, EJ Emerton retorted "sorry I do not understand your argument. Maybe I am just being stupid" … . This appeared, in my mind, to be a sarcastic comment. I did not think for one minute that EJ Emerton thought he was actually being "stupid" [28]

© EAT 2021

12. There were other points which, in my opinion, EJ Emerton unnecessarily made out andwhich were exclusively directed at Professor Werner, one was that "we have got limited time" … and another "we seem to be going around in circles here … . I do not recall EJ Emerton unnecessarily criticising the Respondent, or its representatives, as much, or if at all, likewise to his frequency, tone and attitude towards Professor Werner during the Hearing. [29]

Preliminary hearing for case management, 10 July 2019

13. I witnessed the unfavourable attitude toward Professor Werner early on in the CM Hearing, on one occasion when Professor Werner expressed concern he was not ready for the CM Hearing and that he thought he needed some time to prepare, EJ Emerton unhelpfully responded to him saying "if you are not prepared to pay a lawyer, if you wish to attend on your own behalf, you knew that we were going to deal with case management, so you had plenty of notice of that. If you are not ready then we will go ahead" [31]

14. Some further examples of what I believe show EJ Emerton's disfavour of Professor Werner and/or impatience are regarding [32] *Mr Wesley then sets of a series of comment made by EJ Emerton that are consistent with the transcript and so are not repeated here.*

15. Particularly, the berating about Professor Werner's request for disclosure was a predominantly unprofessional and very clear outburst of displeasure and irritation. I do not recall any other judge, in all the time I have attended court, over the last 19 or so years, to have acted like this. [34]

© EAT 2021

Annex 6

Key extracts from the witness statement of Barbara H.E. Halliday

1. I can say without hesitation that I do not believe that there was any procedural irregularity at the hearing on 10 July 2019 … (stated as 10 July or that Employment Judge Emerton displayed any bias, appearance of bias nor was there any unfair conduct of the hearing. [2]

2. The hearing for me was very difficult because of the particular circumstances and because there was a huge amount at stake for the University and for me personally, but that aside, there was nothing that occurred that made it stand out from any other hearing. [3]

3. Dr Werner's line of cross examination was confusing, but I tried to answer his questions to the best of my ability. He kept repeating questions and going over the same ground, when his point had been made. Some of his questions tried to go behind privilege and, as I had made clear in my witness statement, I was not prepared to waive privilege and maintained this position while giving evidence. [7]

4. Dr Werner's line of questioning was focussed on making me out to be a liar, and I use that word because the tenor of his questioning went beyond tryingto establish lack of candour or lack of honesty. Being cross examined by Dr Werner was not a pleasant experience, though I have no argument that he was entitled to cross examine me and I had to answer for the catalogue of errors that landed the Respondent in that position. I did not feel that EmploymentJudge Emerton was intervening to protect me. When a point was made, he expected the Claimant to move on and not keep going over the same ground. In my experience, there was nothing unusual in that. [8]

5. Employment Judge Emerton, at that hearing, also took the time to give the Claimant, a litigant in person, advice and direction about how his claim should be presented. Again, I have seen this happen many times with litigants in person and there was nothing unusual in what Employment Judge Emerton did or how he did it. [9]

© EAT 2021

Annex 7

Key extracts from the comments of Employment Judge Emerton

Rule 21 hearing 5 June 2019

1. Before the hearing, I had read the claim form and the schedule of loss (the latter had been provided by email) . I had noted that many aspects were unclear and would need to be clarified before judgment could be issued. [7]

2. … the claimant (a litigant- in -person) had provided five lever-arch files of evidence, containing some 1,600 pages, and a detailed updated schedule of loss. [8]

3. I was keen to apply the overriding objective and to ensure that the Appellant remained focussed on the issues which I had to determine, having explained at the start of the hearing what needed to be achieved. At no stage was I "unfriendly or impatient", but made it clear that I would not have time to read through five lever-arch files of evidence, and that he would need to be ready to explain his case to me. [10]

4. The procedure which I follow in such cases , and which I followed on this occasion, was to ensure that I obtained from the Appellant all the information which I needed in order to be able to issue judgment in his favour. My tone was that which I would normally adopt in the circumstances, in seeking to assist him in clarifying his unclear 10 heads of claim and the basis for calculating remedy, without which I would not be able to issue the judgment he sought. The Appellant may have wrongly interpreted this as "mocking" or "bullying", perhaps failing to appreciate that I would not be able merely to award him the sums he asked for; without any analysis. I do recall that the Appellant appeared to be finding it unexpectedly difficult to focus on the essentials of his case, when asked to clarify his claims and remedy, which made the hearing more challenging to manage. [11]

5. I was, however, able to obtain the necessary information and to issue (in Dr Werner's favour) the largest Employment Tribunal judgment which I have ever signed. [12]

Cross-examination of Ms Halliday

6. At no stage did I prevent either party from speaking, save to prevent the adducing of inadmissible and legally privileged evidence. I did intervene, as I always would in the circumstances, to remind parties of time-limits for cross-examination, of the issues to be determined (under Rule 20 and the test in *Kwik Save Stores Ltd v Swain* etc), and also to suggest that it was not necessary to ask repetitive questions, but rather that the cross-examination should move on to the next topic, in view of the limited time available. This was nothing to do with the Appellant himself, but a response to the way he asked questions. The Appellant was not prevented from putting his case to the witness. [19]

7. I had timetabled cross -examination, as I almost always do under my case management powers, and it was agreed that each party would have 15 minutes to cross-examine the other party's witness. In the event I permitted the Appellant him to take almost 30 minutes in cross-examination. He did not ask for more time. [22]

© EAT 2021

Annex 8

Employment Judge Emerton's not of cross examination of Ms Halliday [numbers added to questions]

[1139]

Ms B Halliday (Examination in Chief) Sworn

Adopt witness statements

[1140]

Cross-Examination

1. (Curious that [the number of] documents "not see", and one or two selected did see?)

I don't think it's curious, I think it is an embarrassment to me as a professional, and to the University.

2. (Only see some documents, not many reminders on remedy - believable?)

I'm telling the truth.

3. (Now Instructed counsel - in December decided to instruct him, why not then?)

My witness statement explains what's going on. Normally Deborah and I usually do it, but she was out of the picture for January. What I did was to gather legal parties [?], Went through claim, Identified issues, looked for documents to xxxxxxx.

Two lever arch files or preparation and notes, preparing instructions for counsel and draft Grounds.

I was happy to instruct Ed [Capewell] - but never got instructions finished, run out of time, also doing draft response.

4. (Could use other firms fixed fee)

Various people had provided locum cover and dealt with the grievance and disciplinary ...

5. (EJ - beware don't break professional privilege)

[1145]

... And with the benefit of hindsight, could use.

6. (Were working-why not existing copies?).

Privilege. Nervous as to what was exhibited.

7. (Aware of ET claim in the last 12 months of higher value?)

© EAT 2021

No.

8. (Witness statement paragraph 16 - drafting Grounds of Resistance in January, witness statement paragraph 17 only **xxx?).**

I was still working on gathering information - claim is **xxxxx,** but UKVI thing came out of the blue.

9. (Give priority [to it] - or decision to give UKVI priority?)

I did give the claim priority, but not enough.

10. (Application for extension of 24 January 2019, stated as fact - respondent has been working towards date for ET3/grounds of resistance, but the witness statement claims did no work until end of January?).

Which paragraph?

11. (Paragraph 17, paragraph 20 - application 24 January says 'working towards' – but now say not - inconsistent?)

I was doing both, a lot of attention directed into UKVI, still drafting resistance.

12. (Now claim 24 January-)

I was working towards the date, but a whole extra load of work.

13. (Page a 145 - letter of 24/1/19) (intending ...)

I'd spoken to counsel xxx this, and I accept not well worded. I'd spoken to clerk, but not yet spoken to counsel - I was working on the instructions.

14. (Misleading the tribunal to give excuses?)

No.

[1152]

15. (witness statement paragraph 34, page A 182 - 5 April)

I'm referring looked like disclosure of evidence, page A 187 - 17 April 2019, on top [?] of this. Claimant wrote A 182.

16. (Page A 183 paragraph 3)

That does refer to a notice of remedy hearing.

17. (EJ - It seems to have been case managed - if not a party, can't make an order).

18. (Respondent - 17 April)

© EAT 2021

Page A187 - I received a letter of 17 April 2019, received 24 April 2019- refers to TCMPH on 5 June. I thought there was still a TCMPH.

19. (I was confused - TCMPH -so I wrote to ET , - page A188 - copied to respondent page 190.2 - Sent to respondent with letter of 29 April 2019) (strange?).

20. (EJ - witness can't comment).

21. (How do you explain - not asked for four months - knew xxxx?)

Because it was case managed.

22. (Page A188)

It's not on my file.

23. (See notice of remedy hearing?)

I do recall the 17 April letter.
When judgment was entered, I checked through what I had, didn't see that until [Claimant's] witness statement.

24. (EJ [to Claimant] - over 20 minutes - try to conclude)

25. (time were xxx)

[1200]

26. (EJ - my role to xxxxxxxxxx xxx - please conclude the cross-examination)

27. (University's investigation concluded?)

Yes, but I'd not seen

28. (You thought the claim so without merit, of no xxxxx)

No

29 (8 February - witness statement paragraph 28 - you thought you'd done it thatafternoon)
No.

30. (Plausible - I question)

No, my answer: on 8 February 2019, Director of H&S came to my office, I was working on other things. XXX said my xxx had phoned, so I looked that is - I worked on it.

31. (Thought submitted it - you get an instantaneous response when you submit – see that?)

No ...

© EAT 2021

32. (Why not check?)

I thought I'd done it. I thought squared away one thing. Then caught up with other stuff.

33. (Decide at any point - ignore [my claim] because [other] higher or complex or higher priorities?)

No

34. (EJ - Why did it go so wrong?)

I think staff problems at the time, an awful lot going on, an awful lot of plates spinning. Obviously looked back, it made me feel sick, seems to have gone wrong at every single point at the process. Never treated as a claim to be Ignored. Did do a lot of work preparing grounds of resistance.

[1209]

© EAT 2021