JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Halstead**

Respondent: **University of East London**

Heard at: **East London Hearing Centre**

On: **20, 21, 23, 27,28 March and 18-20 June 2018,**
21 June 2018 - Tribunal Only

Before: **Employment Judge Prichard**
Ms L Conwell-Tillotson, Member
Mr L O'Callaghan, Member

Representation

Claimant: In person

Respondent: Mr S Brittenden, counsel instructed by Mills & Reeve Llp, Cambrdidge
Mr P Gass, solicitor, Mills & Reeve Llp
Ms M Todd-Jones, trainee solicitor

RESERVED JUDGMENT

1. This case is adjourned, part heard to resume on 19-22 February, 26 & 27 February 2019.

2. The claimant's application for the judge to recuse himself is refused.

3. The tribunal has made a provisional order, subject to the claimant's right to respond at a hearing, that the Dean, Professor Cerwonka, shall cease to give oral evidence to this tribunal after today.

4. The claimant is to provide medical evidence of her indisposition on Wednesday 20 June.

REASONS

1. This is now day 9 of this hearing, which was originally listed for 7 days. The

tribunal could only offer 6 days in the end, but that proved to be a major under-estimate because the tribunal had to adjourn on 28 March part-heard, for a further 7 days, 3 of which were to be for the tribunal to deliberate on and give a judgment on the final hearing. That has now proved impossible in this resumed hearing, which started on Monday 18 June. The tribunal has only sat for 3 days.

2. The 2nd day was entirely occupied with hearing argument on the claimant's application for the Judge, Employment Judge Prichard, to recuse himself on the grounds of apparent bias. There were 45 minutes at the end of the day when the tribunal heard a short amount of further evidence from the university Dean, (now ex-Dean), Professor Cerwonka, on the basis that if we decided the recusal application in the claimant's favour, the case would anyway have to start again *de novo* before a totally different panel.

3. In the event tribunal decided not to uphold the recusal application. We stated we would give reasons later, in order to make the best use of the hearing time which had been allocated.

4. At lunch time, the claimant gave a message to the hearing clerk (a) that she wanted to complain and (b) that she was too unwell and "couldn't go on". When the tribunal reconvened at 2:10pm, the claimant denied having said either of those things. The clerk is absolutely positive that she had said those things to him. She said that she asked the clerk in principle about if there was a complaints procedure, but that is not what he heard. She also denied that she said she was "too unwell to continue". Again, the clerk is quite positive that is what she said to him.

5. She then sat almost mute for long periods, coughing weakly, saying that she had pains. She said she was "unwell" and was at pains to say she did not feel "stressed". Later, having attempted to resume her cross examination of Professor Cerwonka, said she had pains in her stomach, in her back, in her head, and that she seemed to have contracted a virus.

6. She said of the judge that no-one had ever spoken to her like that in her life, apart from the Dean, Professor Cerwonka. She said she was not unwilling to proceed and said she was suffering. Still there was no application to adjourn. At one time, her head was in her hands. It had been noted by the tribunal and she had made no secret of it, quite the opposite, saying that she had been in pain for 3 days. She stated this time "my pain is getting worse today". She finally stated "I have to apply to adjourn on grounds of ill health".

7. At one time, the claimant told the tribunal that she was on a prescribed painkiller. She informed us this was Co-dydramol. Following this application for postponement, counsel helpfully reminded us of cases on parties being unable to attend for medical reasons. One of the most best known and useful Court of Appeal authorities is *Andreou V Lord Chancellors Department* [2002] IRLR, 728, CA.

8. He emphasised the need for proper medical evidence, hence the order above. What Andreou stipulates is such evidence should include a medical diagnosis, details of medical, symptoms and duration and confirmation of inability to participate in proceedings and a prognosis. Even if we do not get all that, expect some more detailed and contemporaneous diagnosis. The claimant was directed to obtain such evidence as soon as possible whilst she was still experiencing whatever symptoms she was then experiencing.

9. The claimant seemed indignant that such an order should be made, but it is absolutely routine in the tribunals when adjournments are requested or granted on medical grounds.

10. In the circumstances of the adjournment, the tribunal considered that it would be too risky to reconvene for the 4th day, today 21 June because the claimant might not get notice to the tribunal and the respondent of her state until it was too late.

11. In the event the claimant has provided an email dated 26 June sent to the tribunal and the respondent's solicitor. It attaches a Med 3 medical certificate from her local Surbiton GP certifying her as unfit to work for 1 week (20-27/06/18), with a diagnosis of viral gastroenteritis.

12. The same email registers strong objections to the order above that the cross-examination of the Dean should now cease (see below). That objection will now have to be considered at the hearing in February 2019 when we reconvene.

Recusal

13. The written application for the judge, (apparently not the whole panel?), to recuse himself, was received by the tribunal and the respondent on the morning of Tuesday19 June, at 9:58am. The timing of it caused maximum disruption. The tribunal was just about to sit. The respondent had no notice at all that this was coming and counsel stated to the tribunal that they were "shocked".

14. It is set out under under 4 headings:

1) Stepping into the arena in a manner which has prejudiced my case
2) He appears to be prejudging matters and stating conclusions
3) Apparent bias - he seems openly to be against me
4) Apparent bias - he appears to be partial to the other side.

15. There are some strong and over-general allegations in it including the closing lines:

> 'I fear that the learned judge has made up his mind. He is concluding on issues and commenting on the veracity of my claims while evidence is being heard. He is forcing me to give evidence while I am cross examining. He has shown that he has no regard for me, my feelings and my case. I ask that my matter be reassigned to a new panel with a different judge'.

16. We heard a lot of argument on this, both from the respondent and twice from the claimant, when she initially orally developed the application, and then responding to the respondent.

17. The Judge started by saying that to the extent that he has intervened, and it is true that he has, he was to trying to help the claimant and also trying to help in the process of insuring a fair hearing which takes a proportionate amount of time, in which the tribunal is ultimately able to give a properly informed and fair judgment.

18. Unfortunately, the recusal application contains broad assertions without sufficient identifying detail to know what the claimant was referring to and when. These are the type of criticism which she is alive to herself. It is the same as her criticism of the student complaint that we have heard about in the course of this hearing. It is true that in

evidence, during her cross-examination, we have had to orally ask the claimant for as much identifying detail as possible in order to understand what she was saying, and what she was putting to the Dean.

19. Many of the claimant's criticisms are made out of context, or reflect a lack of understanding of the nature of the whole process which is happening at this tribunal hearing.

20. An example of an over general statement is:

> "I am cross examining witnesses from the other side, he interrupts me to ask me questions and he cross examines me at this time, grilling me to provide answers. He forced me to return to evidence I had already given and to discuss it again and treated me differently from when I had first stated it'.

It is hard to see what exactly the claimant is referring to, but on further examination, she seems to have the idea that, when she is cross examining one of the respondent's witnesses, she does not have to give any evidence herself. If the judge has asked her at any stage, to state her evidence when she is cross examining, it is because the allegation she is putting to the witness has somehow disappeared and she is doing no more than running generalised assertions past the witness. That is not a profitable use of tribunal time.

21. The wholepremise of her questioning was no longer obvious to the tribunal. The claimant had to be asked to re-state her case for us to see if this was a relevant line of questioning at all. "Relevance" is drawn quite wide, but nonetheless it has been necessary to remind the claimant to focus. After 2 case management discussions, the parties eventually agreed on a set list of 32 issues. They have now been shown to be heading issues. Those are just the discrimination issues. All told, there are probably some 80 issues in these proceedings. It is far too many. It was always going to be a difficult case to manage. It was always going to be hard to achieve a fair hearing within a proportionate time estimate.

22. The respondent has had counsel and solicitor present throughout the whole hearing, so it has been witnessed by professionals with professional instincts to detect any sort of irregularity or bias in the process. As a general comment, the respondent said that the tribunal has made enormous concessions to the claimant and has been extremely patient. Counsel stated that he has been called since 1999 and cross-examining the claimant has been the most difficult cross examination he has ever had to undertake because the claimant, in his perception, was persistently refusing to answer questions so that he simply had to move on, leaving his question unanswered.

23. It was quite clear and, indeed the claimant said so more than once after she had made the recusal application, that she expected it to be heard by a different Judge. That was not, and never has been the process, with a recusal application. It is always decided by the Judge or panel before whom the case is proceeding, and whose behaviour is the subject of the criticism.

24. We were referred to the extensive case law on the law of recusal. Perhaps the most helpful source of law is *Ansar v Lloyds TSB Bank Plc and Others.* [2007] IRLR, 211 CA. The tribunal have also considered the definition of apparent bias from *Porter v McGill* [2002] 2AC, 357:

> "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".

25. The *Ansar* case is helpful and confirms what I had originally said, that if the tribunal does not have a positive duty to recuse itself, the tribunal has a positive duty not to recuse itself. There is no middle ground. The *Ansar* case was a endorsement by the Court of Appeal for a judgment of Mr Justice Burton in the EAT on recusals. A tribunal cannot recuse itself just because it would feel happier to do so. This would be an abrogation of its duty and could lead to parties believing they can indirectly choose their own Judge. This is a fundamental principle in the English legal system. That principle remains, however tempting it is, on a human level, for the panel to take the recusal option.

Criticisms of the Judge

26. The tribunal asked the respondent to respond point by point. There is a bulleted list of 23 criticisms. Under the heading "**Stepping into the arena in a manner which has prejudiced my case"** there follows Criticism number 1:

> "That he, the Judge must be living in a parallel universe, stated on June 18 2018, because he could not see the veracity of my claims about my experience with regard to a stated issue. He stated this to me while I was meant to be cross examining the witness".

The Judge recalls saying 'parallel universe'. It was a reference back to the previous portion of the hearing in March and was a reference back to the last topic discussed on that date before we adjourned part-heard. I made a clear note stating the claimant's allegation that the Dean had only activated the student complaint against the claimant after a complaint had been made at her (the Dean) and that she was trying to deflect student bad feeling towards herself onto the claimant. The claimant states that she did not say that and /or certainly did not mean it. She says it was because I, the Judge, had forced her to give evidence in a certain way which misstated her case. This prompted the judge's remark on 18 June about 'parallel universe' because we had all been sitting in the same room and everybody seemed to have a different recollection from the one the claimant had.

27. Criticism number 2:

> 'That the racial abuse was crude and where he at different times, made statements questioning and pre-judging the impact of my experiences, including the above about being in a parallel universe'.

The judge has no specific recollection of using the phrase 'crude racial abuse' but it is a phrase he might well have used to characterise the worst kind of old fashioned racism (e.g. calling an Asian person a "Paki"), just to summarise everything that most modern cases are not about. We deal with more nuanced race discrimination complaints nowadays. The point is that the claimant asks the tribunal to find that a passage in the student complaint to which she took severe exception was a "racial attack".

28. The passage is:

> "… Students feel she is racially prejudiced. More favouring white students work and getting offended when you considered her to be anything other than westernised or from a white background. There is a clear indication of discrimination based on other things beside academic ability".

The claimant herself is from Guyanese background and is of East Indian ethnic origin.

29. This criticism seems to take the Judge's phrase "racial abuse", out of context, and then conflate it with the parallel universe comment which had absolutely nothing to do with it. The claimant's discrimination claim is nuanced. It seems to be something akin to "cultural appropriation". It goes so far as to characterise this passage as "a racial attack".

30. This particular student complaint, anyway, was not upheld by the respondent on the ground that it was based upon the anecdotal evidence of one student. In fact, the Judge had managed to find elsewhere in the bundle, an indication that this was more than just the anecdotal evidence of just one student. We would like to think this is one example of the tribunal and the Judge trying to help the claimant, as an unrepresented litigant. Again, in the claimant's favour, the Judge stated that the report into this student complaint by Doctor Bernstock, seemed to lack nuance and failed to pick up some of the undercurrents the claimant was so aware of.

31. Criticism number 3:

> " … despite it's own procedures and policies, the respondent did not need to check at the inception, … whether a complaint of racial abuse had indeed been authored by all students alleged".

This does not seem to be a criticism of the Judge at all. It seems to be a criticism of the respondent. It is a re-statement of the claimant's case. Its relevance to a recusal application against the Judge is not clear.

32. Criticism number 4:

> "That the respondent, regardless of its procedures and policies, had a right to ignore this racial abuse in the first stages, and process the complaint against me inclusive of racial abuse against me".

Again, this is a re-statement of the claimant's case against the respondent on which the tribunal has made no finding. It is not apparently suggested by the claimant that the Judge indicated concluded findings on either of those criticisms (3 or 4). It happens to be the claimant's case that the entire student complaint should have been struck down from the start because of the two sentences which we have quoted at Para 28.

33. Criticism number 5:

> "That the respondent could have deferred its investigation into the racial abuse against me".

The tribunal panel is certain that we have made no finding and given no indications on this point. That perception / recollection is now also confirmed by the respondent.

34. Criticism number 6:

> "Accepting statements made by the key witnesses and repeating these without raising issues of corroboration / related issues to the witness and in the process minimising opportunities for me to ask about these unsubstantiated statements. Re-presenting these statements and asking me to go over my own statements earlier for the Judge to make conclusions on the issues and without referring to the notes".

It was thought by the respondent, that this might have referred to the part of the redundancy process where alternative posts were suggested for the claimant and his clear

recollection that she, the claimant, had declined to take any of those jobs because they were below Reader level and therefore, below her status, although her salary would have been protected for a period.

35. The claimant has apparently completely changed her position on this, which was a surprise to us to hear. She says that she did not refuse any posts. She did not apply, which is technically correct, but we are not sure it is a helpful distinction to make. Not applying is tantamount to declining.

36. Criticism number 7:

> "That it was acceptable for the respondent to ignore its stated procedural issues in recruiting new staff while proposing redundancy".

This was a reference to recruiting Georgie Wemyss who was to be a lecturer on the Foundation Course to level 3 students. Ms Wemyss apparently had experience in teaching level 3 students on the Foundation Course. It was very different from the work, and the status, of the claimant. There was also recruitment of a lecturer in Refugee Studies, Dr Affaf Sabiri. It did not appear from the claimant's CV that the claimant had sufficient specialist refugee experience. Again, the status of the role was, according to the claimant, below the claimant's status but it appears now that the claimant may have changed her case position on this from that stated earlier. It is still unclear what her final position is. It changes. The tribunal panel has made no concluded finding on the issue, whatever the claimant's position turns out to be.

37. Criticism number 8:

> "That is was acceptable for the respondent to have given me an additional module to lead while in the process of making me redundant".

The claimant raised this when the cross examination of Dr Cerwonka had not even reached this point. The claimant could not specify any point at which the tribunal or the Judge had reached any conclusion or indication on that precise issue. It is hard to see how that found its way into this recusal application.

38. Criticism number 9:

> "Concluded that I have competed with one person for a senior lecturers role without waiting to hear all the evidence on this issue and how I was affected in this matter with regard to all my claims".

Counsel reminded us that, based on the respondent's cross examination of the claimant, the claimant did not apply for alternative posts. Again, this representation in a recusal application is in fact another apparent change of position. We await hearing what the claimant's final position is on this. Again, we stress that the tribunal has not reviewed all the evidence on this. Neither the panel, nor the respondent for what its worth, considers any indication or conclusion has been expressed by the tribunal.

39. Criticism number 10:

> "The Judge said procedural issues not being followed by the respondent would not be considered. He said he would not address procedural omissions in his judgment and effectively blocked, dismissed evidence on procedural matters. He did not make it clear whether his conclusion on these issues related to all my claims including direct race discrimination, victimisation, and

> harassment. He did not say why he would not address procedural omissions".

This, it was clarified, was a clear reference to the student complaint procedure. The tribunal actually spent a long time looking into this. It came to light during the hearing that the wrong version of the student complaints procedure was included in the hearing bundle. It has since been updated by Mr Gass who provided a copy of the correct version and went so far as to provide a tracked changes version so one could see at a glance, what was new in the different version. The tribunal studied this. The tribunal may well have said that differences in the procedural rules must be shown to be material and not just purely procedural because it is unlikely to have an influence on the outcome of the case if it is simply shown that there is a purely a procedural non adherence to the correct policy.

40. That would reflect not just this Judge's view but probably the view of all judges and tribunals hearing discrimination and unfair dismissal cases. So that is the instance of the tribunal that the respondent was ordered to provide the correct version and they complied willingly, fully, and helpfully the following day.

41. Under the 3rd main heading **"Apparent bias, he seems to be openly against me"**, there follows Criticism number 11:

> "His insults started with disparaging my competence as an academic. This is where he stated that as an academic I should know how to answer questions and later that he did not know how someone in teaching did not know how to answer questions. This was before a number of persons including several witnesses for the respondent".

This is where counsel mentioned that this was the most difficult cross examination that he had ever had because the claimant simply refused to answer questions. The Judge's comment about being an academic is just a comment that sometimes unskilled workers have very little education and still manage to conduct discrimination cases before the tribunal without any help. The claimant has a high level of education, and one would expect her to be able to deal with the admittedly difficult business of question and answer in adversarial proceedings. The Judge wanted the claimant to answer the questions for her own sake. Counsel's cross examination was conspicuously patient and good tempered.

42. I may also have commented that an ability to lecture to a group of students might mean that one could speak up. The claimant frequently spoke so softly that it was a strain for the panel and the respondent to hear her and she had to be asked to repeat herself.

43. Criticism number 12:

> "In one instance where I endeavoured to note a discrimination issue against a staff in relation to a comparator, I was told it was turning into 'an invective' and not allowed to make my point".

The respondent remembers me using term. It is a term I use. The respondent also remembered the context. It was at a point where the claimant had launched into a sustained attack on the Dean and the process she conducted. It had no evidential value and to be little more than haranguing the Dean

44. Criticism number 13:

> "He told me that in filing my grievance, I had been 'doing the same thing' as the respondent had

> done in putting forward a complaint against me. This was when I discussed the racial abuse to note how it had been converted into a complaint against me".

We are back to the claimant's contention about a "racial attack" in the student complaint quoted at Para 28. The Judge may well have been making a comparison between the claimant making a grievance and the student group (not the respondent) making a student complaint against the claimant, which was in the nature of a grievance. The respondent had a duty to deal with both. The respondent was not the complainant, the student body was. The claimant considers that there is no comparison between the two because the student complaint contains the two sentences quoted above. It is the logic of the claimant's position.

45. We have not found against her on this position, it is a position on which we must make a concluded finding at the end of the hearing. No one has suggested any detail or any words spoken that could be taken to be an indication or a conclusion on this issue.

46. A grievance is a grievance and that was all the comment was supposed to convey. Ultimately the tribunal may find that the grievance from the students was more than that and an attack. This comment was also by implication an invitation for the claimant to make clear what the distinction between her grievance and their grievance is, whilst she still had time to do so. We now have her answer on that. The distinction is the two sentences in the student complaint.

47. Criticism number 14:

> "When I tried to make a specific point about an international network, I was subscribed to, in order to show a detrimental impact, the Judge told me off again for talking about my international reputation. There was no opportunity for me to properly make the point. This was while I was being cross examined".

Counsel remembered the context of the international reputation. The first was when it came to consideration of alternative positions in the redundancy process. The second was when the respondent, (and there is no dispute about this), put a standard out of office reply message on the claimant's academic email account after her contract had terminated. The claimant's cross examination lasted a long time. No-one can recall at all that the tribunal or the Judge stopped her at this point. The claimant could not give any details about how the Judge had "told me off again" for that or anything else.

48. The tribunal did ask the claimant whether she had thought of composing her own out of office assistance message if the one the respondent put on for her was not to her liking. Clearly to have a current academic .ac email address is an asset for any academic like the claimant.

49. Criticism number 15:

> "On day 2 of my cross examination, I discovered that the respondent counsel had asked me a question on an incorrect document presented by the respondent. I asked to return to this on a previous question and the Judge told me disparagingly, that I always want to go back to questions. I then had to struggle to state the issue. It was later established that the document referred to by the respondent had been incorrect. At the end of the day the Judge informed the respondent counsel that he could always return to questions. He did not similarly inform me that I could".

This is another reference to the matter referred to above under criticism number 10 - the wrong student complaint policy being in the bundle, and the provision of the correct one with the tracked changes. As counsel was doing the questioning at that stage, I would have said that when the correct policy arrived, that counsel could indeed ask questions when we saw it next day, but that he should otherwise proceed with questioning, and leave it until we saw the correct policy. The reason why I did not inform the claimant she could return to questions was that she was not questioning, she was being questioned by counsel. It is a simple explanation. Her opportunity to question on the policies was still in the future.

50. The Judge cannot specifically recall saying that the claimant always wanted to go back to questions unless this was another example of the Judge doing his bit where counsel was failing to get an answer to a question. There is no clear recollection of this. The context lacks any detail so there have been instances both in her questioning and in her answering of questions, where she apparently backtracks, despite the wish of others (especially the Judge presiding) to progress the hearing.

51. Criticism number 16:

> "Similarly at the start of proceedings when I attempted to inform the Judge that a submission was pending (based on representations the respondent had made about my breach of contract claim) he told me off. It later turned out 5 days into the hearing, (March 28 2018), the Judge was unaware of my breach of contract claim. He was disparaging when I tried to state the respondent have overloaded me with work in the final term beyond my contract".

This was a simple misunderstanding on the tribunal's part. There was no reference to the breach of contract claim in the two previous case management hearings. The file was not coded as a breach of contract claim but the respondent has always agreed that there is a breach of contract claim arising from the claimant allegedly being asked to undertake work above and beyond her contractual duties. The tribunal is now aware of it, is seized of it, and it is one of the issues in the case and we have to make a finding on. The panel has no recollection whatsoever of any disparagement. It was the tribunal's own mistake. The same breach of contract claim is put as a direct discrimination complaint because the claimant is from a non-white background. We have now got it.

52. Criticism number 17:

> "At one stage he commented on my English. There was some laughter and I could not hear clearly what he said subsequently".

The tribunal was at a loss to recall anything at all about this, as was the respondent. It did not ring a bell. There is nothing apparently wrong with the claimant's spoken English. We pressed the claimant very hard on this because it is a clear allegation. The claimant eventually explained that a note taker she had present on the last occasion (it may have been one of the students, Francesca or it might have been Ms Indira Monteiro, another of her young note takers) had been shocked at the way that the Judge had treated the claimant and had felt unable to attend any further because the experience was so traumatising. This person had apparently noted that the Judge had made a comment about "baby voice".

53. The panel as a whole is quite certain that if such words had been used by the Judge, none of us would have forgotten it and nor would the respondent. There may have

been some laughter at other times in other context. The Judge is aware that he enjoys occasional moments of levity which can lighten the atmosphere of a hearing, which can otherwise be unremittingly sombre, grim, and depressing. No laughter whatsoever was directed at the claimant and no-one can recall anything of the sort. As the respondent commented, "…we were not mocking the claimant in any way".

54. Criticism number 18:

> "At one stage when I was cross examining, he demanded of me, 'say if you should not have been made redundant, say it now' At another, the Judge stopped my cross examination to demand I answer yes or no to a question which made me feel compelled to give any reply"

No clear attribution was given by the claimant for either of these. One of them may have been the evidence at the close of 28 March which is referred to above, when the claimant said the Judge's questioning forced her to give an answer that was not her true answer about the Dean wanting to deflect student anger from herself onto the claimant. At another stage, the Judge might have asked for a "yes or no" answer after the claimant had apparently refused to engage with a question to state her position. The Judge would never insist on simply having a monosyllabic answer but unfortunately, the claimant's way was to launch into a general discussion that diverted from the question so that one eventually forgot the question.

55. Criticism number 19:

> "On June 18 2018 he called me childish at a time when he was aware I was feeling unwell and without no [sic] reason apparent to me to make this remark".

The Judge and the panel can recall the Judge using the word 'childish' in this part of the hearing. This emerged possibly to the panel's recollection, during a passage of evidence about the claimant's line manager, Tim Hall. The Dean was being asked questions about her interactions with Tim Hall.

56. It was a matter of note that the Judge during the cross examination of the Dean, frequently had to ask the claimant not to interrupt the Dean's answers because she had a tendency to interrupt the answer before it was out, in order to contradict it. The cross examination had degenerated and had become fractious, on the claimant's part.

57. The Judge said to the claimant that it was not polite to interrupt the Dean and it was an unattractive trait. The trait could be seen as childish. The claimant apologised for interrupting. The Judge was making a point. It was not some technical legal rule but just common everyday courtesy.

58. The other point about this criticism is it seems to be conflating two different things. The claimant did not say that she was feeling unwell until the afternoon and the incident, as is clear from the panel's notes, occurred in the morning around 11:05am. Counsel's notes also agree.

59. I now recall, I stated that it could be seen by somebody as childish, as if to say to the claimant, that she would not want to be seen in that light and should not take that risk. I was not directly calling her "childish". What I had not realised until the claimant mentioned it, was that that word "childish" happens to have a particular deeply unpleasant socio-cultural reverberation for people of colour. It is something the panel was previously

unaware of.

60. The 4th and last heading is **"Apparent bias - He appears to be partial to the other side"**. Under Criticism number 20:

> "He makes statements to the other side and has indicated what seems to be a familiar relationship between counsel and himself. On occasions I have felt demeaned by his approach to me when he is speaking to counsel on the other side".

Counsel addressed the tribunal and stated that in all his years in practice, if he has been before me, the Judge, he cannot recall it. I, as the Judge, for my part, say I can never recall having had contact as a practitioner or as a Judge with Mr Brittenden. I also explained during the recusal application that the tribunal needs assistance from the respondent's side of the room, locating pages in the bundle and also keeping a sight of the long list of issues to make sure that we are not going off on a digression unnecessarily.

61. The claimant says she feels 'demeaned' by the tribunal's talking to the respondent's counsel and orally she developed this even further into a strange theory that the Judge is somehow "creating a space" for Mr Brittenden to be overbearing to the claimant. I am aware of no such dynamic at all, even at a subconscious level and nor are the other members of the panel.

62. The claimant referred to a "camaraderie" between the respondent's counsel and the Judge. What she seems to be witnessing is arms-length mutual respect and good manners between legal professionals. She says she felt excluded from 28 March and that I was "talking all the time to counsel". I have no such recollection. It is inevitable in any hearing when one side is represented and the other is not, that the tribunal will look to the side that has experience of these hearings to sometimes give guidance because we do not expect lay people representing themselves, with no previous experience of tribunal hearings, to know the answers. This is the recollection of the Judge and the panel members. Counsel has a duty to assist the court / tribunal under their professional Code of Conduct. So some liaison is bound to take place in a hearing such as this.

63. Under Criticism number 21:

> "I felt at one stage that he was laughing at me while speaking to the respondent's counsel".

64. The tribunal panel can remember no such thing happening. Indeed, it has been obvious from the demeanour of the claimant from the start, who is a serious individual, that she is not a suitable person to laugh with, even jokingly or ironically. The accusation is of gross lack of professionalism in the Judge. The claimant can give no details of when this happened and what the context was. The respondent has no idea whatsoever what this could have been. It is just a generalised assertion with no detail and no context. The tribunal cannot deal with that.

65. Generally we have done our best to recall if any of the claimant's suggestions rings a bell in any way. Sometimes we have recalled incidents which might not been exactly the ones which the claimant was referring to, given the lack of any detail from her.

66. Under Criticism number 22:

> "On one occasion he told me I was acting like a barrister and at the same time informed counsel for the respondent that this comment was not directed at him".

This is true. I made the point that many barristers like to split hairs and it seemed to me the claimant was doing it in this case. As an afterthought I also said to Mr Brittenden, who does not seem to be a hair-splitter, that I was not having a personal dig at him. I cannot remember the precise context of the fine distinction that was being made by the claimant at the time.

67. We all recalled this being done in a light hearted jokey way and it is astonishing to have the claimant take offence at it.

68. Criticism number 23:

> "He practically took over the cross examination of the key witness on one of the days and ignored me almost totally whilst speaking with the respondent counsel at different times. He has asked most of the questions of this witness and I feel there has so far been insufficient opportunity to adequately cross examine the witness on issues key to my claims".

The claimant cross-examined Professor Cerwonka, the Dean, for 12 hours and 15 minutes. By the time we adjourned, part-heard, on 20 June, it was over 5 days of hearing time. There was no sign at all that the claimant was anywhere near to progressing through the topics she needed to cover with Professor Cerwonka at that stage. She had made the Judge extremely wary of pointing this out, in case it made her "unwell". Effectively, the Judge felt unable to manage the proceedings because of that dynamic.

69. The claimant was warned on Monday, that the Dean could only attend on Monday and Tuesday. The Judge said the end of the Dean's evidence would have to be at the close of Tuesday. The claimant was given the warning. After the hearing on Monday, Brittenden spoke to the claimant and the claimant complains about this. He apparently warned the claimant there would be a 'guillotine' at the end of the Dean's evidence at the end of Tuesday. This is part of the dynamic she complains about, that I had somehow "created a space" for the respondent's counsel to take control of proceedings. That perception is frankly irrational.

70. Professor Cerwonka left the university at the end of the academic year 2017 and is now working elsewhere in central London. She has had to get leave of absence from her current job in order to testify here. In the event, the respondent and the Dean were extremely accommodating having lost the second day of her evidence.

71. Having all but lost this 2nd day of her evidence to this recusal application. The Dean said she could make herself available for Wednesday. She asked the tribunal to issue a witness order for her to show to her employer. The tribunal promptly provided one. We were grateful to the Dean making herself available.

72. I also stated to the claimant that there comes a time when the tribunal considers that a proportionate time allocation has been given to any part of the process, in this case cross-examining the Dean. It was in an effort to speed it up and to get straight to relevant points. The intention was to help the claimant and to help the hearing process. The claimant, far from being grateful, sees it as an unwelcome interference with her role. In

truth, many of her questions have been marginal to the issues at a time when hearing time is, and has to be, limited. The panel felt we could not conceive of a time when the claimant would run out of questions for the Dean, barring sheer exhaustion.

73. In June, the claimant repeated many issues that we thought had been dealt with in March. We seemed to be going backwards rather than making progress.

74. She has often showed reluctance, verging on refusal, to accept evidence which she did not like. I consistently said to the claimant words to the effect that if there is an answer she does not like, she can challenge it. What she cannot do is ignore it, and then make out, 3 months later, it was never said.

75. We should put on record that the claimant has consistently asked for proceedings to be taped. She has expressed suspicion about the integrity of this tribunal hearing. To quote her words verbatim, (she made her recusal application tearfully):

> "Equality rights are being ignored in the very tribunal that is here is enforce them" and that the experience was "dehumanising".

76. For what it is worth, the respondent stated that the Judge had never tried to hijack proceedings, had persistently been patient, tolerant and willing.

77. We are acutely aware that in this interim judgment on a case management application, the tribunal has commented on the evidence just to give context to the claimant's complaints, for the claimant's benefit. The tribunal has emphatically made no findings in this judgment on the merits of the claim or the response, or made findings of fact on any aspect of the case. All is left to play for, until the end when we finish the evidence and the submissions.

Conclusion on Recusal

78. The tribunal finds this a tenuous and mistaken recusal application. It is therefore the tribunal's duty to refuse it.

79. The claimant at one stage told the tribunal that she has a brother. She stated that she wanted her brother to represent her here. She said, tearfully, it was not her choice to be unrepresented, her brother was unable to do it. One of the brothers was in the Caribbean. The claimant has previously been represented at case management hearings. She had counsel, Mr Midgley, she said she has asked lawyers to take her case.

80. We have literally found no point in favour of the claimant on this recusal application. We have finally allocated 6 days for the remainder of the hearing and we put in a strong direction that the parties should only take 4 days for the rest of the hearing, leaving the tribunal with 2 days (which may not be adequate), for the tribunal to deliberate and dictate a judgment at least on liability.

The Dean's evidence

81. The claimant said she was too unwell to respond to the respondent's application to finish the evidence of the Dean. In fairness therefore, the claimant must have that opportunity but that should be taken at the resumed hearing in February 2019. There are

3 remaining witnesses for the respondent, Alison Bell, Simon Robertshaw (who was substantially in the claimant's favour in her grievance appeal), Holly Duglan (who was not).

Recording the hearing

82. At the end of the first spell of the hearing, the claimant wrote to the tribunal asking for a transcript of the tribunal's panel's notes. She said she was in the process of seeking further legal assistance in the matters and it would be helpful to have a copy of the transcript as soon as possible to provide to a legal representative. In the event they were not provided. They would never have been provided. It is not the tribunal's practice to provide its notes to anybody apart from the Employment Appeal Tribunal if they requwest it for a live appeal there, in the event of an appeal that centres on some evidential or procedural point. The claimant in the immediate run up to the hearing in June applied for the proceedings to be tape recorded. They were not. These tribunal proceedings are not tape recorded. I explained the difference with the county court where litigants can obtain a transcript, which is a professional transcript of the court's recording at a party's (considerable) expense.

83. The claimant has had note-takers, young students here throughout apart from the last day of the hearing in June, when she became unwell because her young female student had to attend her duties at a law clinic in Kingston.

84. We had commented that we find the claimant's relationship with her note-takers strange. A note taker was the source of the bizarre "baby voice" allegation against the Judge. The claimant herself did not own any recollection of this strange incident which the tribunal panel and the respondent cannot recall or believe happened.

Employment Judge Prichard

12 September 2018