Neutral Citation Number: [2022] EAT 102

Case No: EA-2020-000896-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 July 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MRS KRISTIE HIGGS **Appellant**

- and –

FARMOR'S SCHOOL **Respondent**

-and-

THE ARCHBISHOPS' COUNCIL OF THE CHURCH OF ENGLAND **Intervenor**

- -
- -

Mr Richard O'Dair (instructed by Andrew Storch, solicitors) for the **Appellant**
The **Respondent** did not appear and was not represented at the hearing
Ms Sarah Fraser Butlin (instructed by Herbert Smith Freehills LLP, solicitors) for the **Intervenor**
Mr Matthew Donmall (instructed by the Government Legal Services), Advocate to the Court

Hearing date: 22 June 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30am on 5 July 2022

SUMMARY

Practice and Procedure – application for recusal of lay member – fair hearing – appearance of bias

An application for recusal was made on the basis that a lay member of the Employment Appeal Tribunal panel had made a number of public statements on Twitter that expressed firmly held views on issues relevant to the appeal, giving rise to the appearance of bias.

Held: *allowing the application*

Applying the test of the fair-minded and informed observer (**Porter v Magill** [2002] 2 AC 357 HL), and having regard to the relevant context (which included the nature of the debate relating to the issues raised by the appeal and an assessment of the task the Employment Appeal Tribunal would be required to undertake in determining this matter), there was a real ground for doubt in the lay member's ability to approach this matter with an impartial and entirely open mind. That being so, the lay member would be recused from hearing this appeal.

Guidance for future cases provided: a lay member should raise any potential issues of this nature with the judge with whom they are sitting on the case in question; the judge would be best able to act as the fair-minded and informed observer, with an understanding of the issues to be determined.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This is my Judgment on the application for the recusal of the lay member, Mx C E Lord OBE, from the hearing of this appeal.

2. In giving this Judgment, I refer to the parties as the claimant and respondent, as below. This is a hearing on the claimant's application dated 23 May 2022; the claimant has appeared by her counsel, Mr O'Dair. By email of 27 May 2022, those acting for the respondent confirmed they had no objection to the claimant's proposal regarding Mx Lord's recusal; the respondent otherwise takes a neutral position and was not represented at the recusal hearing. The intervenor has also taken a neutral position on the application but attended the hearing by counsel, Ms Fraser Butlin. Mr Donmall appeared as Advocate for the Court, having been so instructed after the Employment Appeal Tribunal requested the Attorney General to make such an appointment on this application.

The Factual Background and the Underlying Proceedings and Appeal

3. The claimant had been employed by the respondent since 2012; at the material time, she was working as a pastoral administrator and work experience manager.

4. On 26 October 2018, the head teacher of the respondent was sent an email from someone outside the school making a complaint about a Facebook post the claimant had made (posting under her maiden name). This was a re-posting of a piece written by someone else, which concerned teaching in schools relating to same sex relationships, same sex marriage and to gender being "*a matter of choice*", to which the claimant had added "*Please read this! They are brainwashing our children!*" and an exhortation to sign a

petition. The complainant expressed the view that this demonstrated homophobic and prejudiced views against the lesbian, gay, bisexual, transgender ("LGBT") community.

5. Upon inquiry, a second post by the claimant was forwarded to the respondent in which she had re-posted an article written by a third party that had included the following statements:

> "The LGBT crowd with the assistance of the progressive School systems are destroying the minds of normal children by promoting mental illness"
>
> "the far-left have hijacked the learning environment and they insist on cramming their perverted vision of gender fluidity down the throats of unsuspecting school children who are a government mandated captive audience"

The post in question was about the use of books in schools in America which, according to the post, promote the concept of gender fluidity. The ET found that the language used in this post was "*florid and provocative*" (ET paragraph 60).

6. In forwarding this material, the complainant expressed the view that the claimant "*seems to find … obnoxious*" a category of person that would include several children at the school (which the ET understood to be a reference to LGBT pupils).

7. After an investigation and a disciplinary hearing, by letter dated 7 January 2019, the respondent informed the claimant that she was summarily dismissed on the ground of gross misconduct. It was observed that the complainant had taken offence at the claimant's Facebook posts, describing them as homophobic and prejudiced against the LGBT community. The letter also referred to the language in the posts being inflammatory and quite extreme. The claimant appealed against that decision and a further hearing took place but the dismissal was upheld.

8. In her subsequent ET claim, the claimant complained of the respondent's actions in taking her through a disciplinary process and in then dismissing her and rejecting her appeal.

Bringing her claims under the **Equality Act 2010** ("the EqA"), the claimant complained that these acts amounted to direct discrimination because of her religion or belief and/or harassment relating to her religion or belief. In this regard, the claimant relied on the following statements of belief/lack of belief (see the ET paragraph 30):

> "(a) Lack of belief in 'gender fluidity'.
>
> (b) Lack of belief that someone could change their biological sex/gender.
>
> (c) Belief in marriage as a divinely instituted life-long union between one man and one woman.
>
> (d) Lack of belief in 'same sex marriage'. Whilst she recognises the legalisation of same sex 'marriage', she beliefs *[sic]* that this is contrary to Biblical teaching.
>
> (e) Opposition to sex and/or relationship education for primary school children.
>
> (f) A belief that she should 'witness' to the world, that is when unbiblical ideas/ideologies are promoted, she should publicly witness to Biblical truth.
>
> (g) A belief in the literal truth of the Bible, and in particular Genesis 1 v 27: 'God created man in His own image, in the image of God He created him; male and female He created them'."

9. The ET accepted that the claimant's beliefs fell to be treated as a protected characteristic for the purposes of the **EqA**. It found, however, that the respondent had taken the view that someone reading the claimant's posts:

> "60. … might conclude that someone who associated herself with such a post (as Mrs Higgs had done) not only felt strongly that gender fluidity should not be taught in schools but was also was hostile towards the LBGT community, and trans people in particular."

10. Rejecting the claims of direct discrimination and harassment, the ET reasoned:

> "61. … the act of which we concluded Mrs Higgs was accused and eventually found guilty was posting items on Facebook that might reasonably lead people who read her posts to conclude that she was homophobic and transphobic. That behaviour, the School felt, had the potential for a negative impact in relation to various groups of people, namely pupils, parents, staff and the wider

> community. It was a suspicion that she had done so that brought about the entire process.
>
> 62. We were also conscious that Mrs Higgs made it clear that she had no intention of desisting from making any further such posts in the future. The suggestion that she might was not, as Mr Stroilov [the claimant's then advocate] suggested, an invitation to her to renounce her beliefs. … had those beliefs been simply stated on her Facebook page in the form which they appear … above, no further action could or would have been taken against her. ….
>
> 63. We concluded that not only the dismissal but the entire proceedings taken against Mrs Higgs were motivated by a concern on the part of the School that, by reason of her posts, she would be perceived as holding unacceptable views in relation to gay and trans people – views which in fact she vehemently denied that she did hold.
>
> 64. In short, that action was not on the ground of the beliefs but rather for a completely different reason, namely that as a result of her actions she might reasonably be perceived as holding beliefs that would not qualify for protection within the Equality Act (and, as we say, beliefs that she denied having)."

11. The claimant has appealed against the ET's decision and, after an oral hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** ("EAT Rules"), was permitted to proceed on amended grounds of appeal, as follows:

> "Ground 1: The ET erred in law in failing to consider proportionality of the Respondent's interference with the Appellant's manifestation of her religious/philosophical beliefs.
>
> Ground 2: The ET erred in law in failing to consider whether the interference with the Claimant's Convention rights was 'prescribed by law'.
>
> Ground 3: The ET erred in law in holding that the employer could lawfully restrict the Appellant's right to freedom of speech to the language of an ET pleading; see (ET 30 and 62).
>
> Ground 4: The ET reached an impermissible conclusion and/or failed to properly explain its reasons for attributing … reasons [of one of the decision-makers] to all other decision-makers; alternatively, misdirected itself in identification of the relevant decision-makers.
>
> Ground 5: The ET erred in law in finding that the Respondent did not discriminate against the Claimant when it investigated and/or dismissed her by reason of the complainant's objection to the Claimant's beliefs.
>
> Ground 6: The ET erred in law in finding that it was reasonable for third parties reading the Claimant's posts to conclude that she was homophobic or transphobic. Alternatively, that finding is perverse.

> Ground 7: The ET's finding that the reason for dismissal was (or was solely) because of the views of third parties about the posts rather than the School's own views about those posts (ET 60, 61) results from the following errors of law: (a) an employer cannot escape liability by pointing to pressure from a third party whose own motivation was discriminatory …; (b) Stereotyping a protected characteristic is a discriminatory reason …; (c) Alternatively, this finding is perverse."

12. Developing these grounds in her skeleton argument for the appeal, the claimant contends:

> "74. No reasonable and informed person … could conclude other than the posts [by the claimant] were a critique of a certain approach to education, whether held by members of the LGBT community or non-LGBT secular liberals."

13. The appeal is resisted by the respondent, which argues:

> "31. … It was perfectly open to the tribunal to reach the conclusion that it was reasonable for a reader of the posts to conclude that the person who shared and endorsed the posts in the terms she did was homophobic and/or transphobic."

The Listing of the Appeal and the Application for Recusal

14. A hearing in this matter took place under rule 3(10) **EAT Rules** before His Honour Judge Tayler on 13 July 2021. Giving leave for the claimant to file amended grounds of appeal, HHJ Tayler permitted this matter to proceed to a full hearing; his order seal dated 14 July 2021 directed that the hearing should take place before a judge sitting with two lay members.

15. During the course of the morning on Thursday 24 February 2022, I was contacted by the EAT administration to alert me to the fact that this matter had been listed before me, sitting alone, on Tuesday 1 – Wednesday 2 March 2022. As this was contrary to HHJ Tayler's direction, I asked that an email be sent out to the lay members to see if any were available to hear this matter on the allotted dates. In the normal course, the lay members for an appeal would be assigned on a strictly rotational basis, with the next person on the relevant panel (either as representatives of employers, or representatives of workers; see section 22 **Employment**

Tribunals Act 1996; "ETA") being asked if they were able to sit. Given the limited time available, however, the EAT administration team immediately emailed out to *all* lay members, on both panels, providing the name of the case and the appeal number. Within an hour of that email, members had been secured from each of the panels, Mx C E Lord and Mr A D G Morris, and arrangements were made for the papers to be sent out so the lay members could read-in, in advance of the hearing. Consistent with the EAT's normal practice, the composition of the panel for the hearing of the appeal would have been apparent from the publication of the cause list during the course of Friday 25 February 2022.

16. On Monday 28 February 2022 an urgent application for an adjournment was received due to the ill-health of one of the representatives in the case. This was not opposed and I duly allowed the application and directed that the matter would be re-listed for the first available date, making clear that this might not be before the same panel.

17. The full hearing of the appeal was re-listed for Wednesday 22 and Thursday 23 June 2022. In the event, the same panel members were available and the matter was therefore due to be heard by myself, sitting with Mx Lord and Mr Morris.

18. On 20 May 2022, solicitors for the intervenor wrote to the parties bringing to their attention "*public statements*" made by Mx Lord on twitter "*relating to the key issues in the proceedings".* On 23 May 2022, the claimant's solicitors wrote to the EAT raising concerns that Mx Lord's public statements related to key issues in the appeal, "*namely the extent to which individuals should be restricted from making comments or statements regarding persons or groups with protected characteristics*"; it was further stated that Mx Lord was "*on the records [sic] as holding strong views opposed to 'gender critical' views, which [they] equate with 'transphobia'; and in support of sex and/or relationship education at school, including teaching children about transgenderism*", pointing out "*All those controversies are*

at the heart of this case". The claimant's solicitors drew attention to three specific tweets made by Mx Lord and raised the concern that these publicly stated views could give rise to a perception of bias in relation to the issues raised by the appeal. The claimant asked that Mx Lord should recuse themselves from hearing this matter as a lay member.

19. After obtaining the views of the respondent and intervenor, I asked that Mx Lord be provided with a copy of the relevant correspondence and asked for their response. This was provided by email on 31 May 2022, in which Mx Lord replied as follows:

> "When I was originally listed to hear this case at short notice prior to its first hearing date earlier this year I did consider whether I had a conflict and indeed sought advice from both Counsel and judicial office holder colleagues.
> In considering the issue, I had in mind the words of Lord Browne-Wilkinson giving the judgment of the House of Lords In Re Pinochet where their Lordships concluded that Lord Hoffmann should have been automatically disqualified from hearing the case because of his directorship of a body closely associated with a party.
> I do not, nor is it suggested that I do, have any association with any party in this current case, although I am a communicant member of the Church of England, whose Archbishops' Council is the intervenor, and so it is not a matter for automatic disqualification.
> I have, in the past served as a trustee or advisory board member of charities in the diversity and inclusion world some of which have stated views on the issues arising in this case. My previous appointments have included the Albert Kennedy Trust, Anne Frank Trust, LGBT Foundation, Pride in London, and Refugee Council. I was also national lead member for equality and social inclusion within the Local Government Association and the City of London Corporation's inclusion lead and served as *[sic]* on the Government's Review of the Public Sector Equality Duty. However, I do not currently hold any such office, which again removes the need for automatic disqualification.
> Whilst I do have views on the topics at the heart of the case, and indeed have expressed some of those views publicly but in an entirely private capacity with no reference to my judicial office, I did not consider them grounds for recusal, for a number of reasons:
> I have held judicial office for almost twenty years, sitting as a Justice of the Peace in some of the busiest courts in the land. In doing so I have always upheld my Judicial Oath "to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."
> During that time, I have heard many cases involving topics on which I have strongly held and expressed views, for example:
>
> - I consider that there are fundamental problems with the Proceeds of Crime Act, and yet I have regularly ordered the detention and forfeiture of funds seized under that legislation;

> - I believe there are significant flaws with Transport for London's approach to licensing taxis and private hire vehicles and their drivers, but I still uphold TfL's policies in determining appeals against their licensing decisions;
> - I strongly support people's Article 10 and Article 11 rights to protest and object to Government infringement on those rights, and yet I often convict and sentence individuals for public order offences related to protest.
>
> In other words, when exercising judicial office, my decision-making follows the facts of a case and pertinent law and nothing else. I have never allowed my personal views to interfere with my approach to a case in front of me.
> In this particular case, upon which I have made no public or private comments, I am confident that if the appellant's grounds of appeal are solid and are supported by the law, then I would be minded to uphold her appeal, regardless of whether I personally found her expressed views difficult.
> What troubles me about this respectful request for recusal is whether it would even be considered if the case related to different protected characteristics?
> If the case related to an accusation of racist conduct leading to dismissal and one of the lay members was a black Trades Union official with a history of anti-racist campaigning, would we expect them to recuse themself?
> If the conduct leading to dismissal was misogyny and one of the lay members was a woman HR director who was an active member of, say, the Fawcett Society campaigning for women's equality, would she need to recuse herself?
> If the answer to either or both of those questions is no, then is it right that I as a bi/queer non-binary person who has from time to time spoken up, in a personal capacity, in favour of the rights of LGBT people should recuse myself in this case?
> I believe that I can try this case fairly in accordance with my Judicial Oath, but of course, I am willing to be directed by the President if she considers that it would, on balance, be better if I did recuse myself."

20. In the interests of transparency, I make clear that I was not one of the "*judicial office holder colleagues*" referenced in the opening paragraph of Mx Lord's reply.

21. In the light of the claimant's request and Mx Lord's views, I directed that this matter should be set down for a hearing. As it would not be possible to determine the recusal issue in advance of the proposed listing of the appeal, I directed that the question of recusal should be listed before me, sitting alone, on 22 June 2022 and that the appeal would therefore be postponed pending determination of this question. I gave further directions for the conduct of the recusal hearing. To ensure that all relevant argument was before the EAT at the recusal hearing, I requested that the Attorney General appoint an Advocate to the Court.

22. On 10 June 2022, the claimant's solicitors filed evidence in support of the application that Mx Lord be recused from sitting on this appeal; this appears at Annex A to this Judgment.

23. Mx Lord was again afforded the opportunity to respond to this material and, by email of 16 June 2022, stated as follows:

> "The extracts from my Twitter account are accurate and represent views I have expressed over recent years on matters relating to LGBTQ+ rights. These are however by no means the only topics on which I tweet, which may not be clear looking at only those identified in the annex to the witness statement. Indeed, in the past 12 months I have tweeted 133 times, which break down as:
> 42 relating to my duties as a City of London Common Councillor
> 37 relating to my interests in sport and sport governance
> 27 relating to LGBTQ+ rights and charities
> 8 relating to other charity trusteeships
> 19 on a wide range of other issues
> I have never hidden either my gender identity as a non-binary person or my sexual orientation as a bi/queer person, nor indeed have I ever hidden my commitment to supporting the rights of LGBTQ+ people. Likewise, I have always been passionate in supporting the rights of people with other protected *[characteristics]* including people of faith, of whom I am one.
> That said, I reiterate the commitment made in my previous submission that my publicly expressed views - none of which relate to the current case - would have no impact in my approach to this or any other case.
> I remain fully committed to acting within the context of my judicial oath and to judging each case on the merits of the facts and applicable law and on no other basis."

24. At the hearing, the claimant sought leave to put in a further blog-post by the lay member, dating from December 2019. I do not consider, however, that this takes matters any further and have not had regard to this additional document in reaching my conclusions on the question of recusal in this case.

The Relevant Legal Principles

25. The claimant does not suggest that the lay member in this case should be recused by reason of actual bias or automatic bias (and see the discussion of these categories of cases in **Locabail (UK) Ltd v Bayfield Properties** [2000] QB 451 CA at paragraphs 3-14; it is noteworthy that the case of **R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte**

(No. 2) [2000] 1 AC 119 HL, to which the lay member referred in their response of 31 May 2022, fell into the automatic disqualification category); the application for recusal is put on the basis of apparent bias, as defined by Lord Hope of Craighead at paragraph 103 **Porter v Magill** [2002] 2 AC 357 HL:

> "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."

26. The underlying purpose of the law on apparent bias is that not only must justice be done, but it must be perceived by the public to be done, see per Lord Hope in **Davidson v Scottish Ministers** [2004] UKHL 34 at paragraph 46. As Lord Hope further explained in **Davidson**, however, "*bias*" for these purposes is a shorthand:

> "47. … it would be a mistake to approach it in this context as if its only meaning were pejorative. The essence of it is captured in the [European] Convention [of Human Rights] concept of impartiality. An interest in the outcome of the case or an indication of prejudice against a party to the case or his associates will, of course, be a ground for concluding that there was a real possibility that the tribunal or one of its members was biased …. But the concept is wider than that. It includes an inclination or pre-disposition to decide the issue only one way, whatever the strength of the contrary argument. A doubt as to whether this is the case is enough, so long as it can be justified objectively."

27. In **Reg v Gough** [1993] AC 646 HL at p 670 (see the citation at paragraph 16 **Locabail**), Lord Goff considered apparent bias would arise in circumstances where the judge: "*might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him*". In **President of the Republic of South Africa v South African Rugby Football Union** 1999 (4) SA 147, at 177, the question was characterised as whether " *the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel*." (See the citation at paragraph 49 **Lauchlan v Her Majesty's Advocate Scotland** [2013] UKSC 36 HL). To similar effect, in **Alan Bates v Post Office Ltd** [2019] EWHC 871 QB at paragraph

29, Fraser J stated: "*Bias includes giving the impression of having pre-judged any issue*." It is, moreover, clear that this can extend to unconscious bias, see **Locabail** at paragraph 89, and per Lord Woolf in **AT & T Corpn v Saudi Cable Co** [2000] 2 Lloyd's Rep 127 (cited with approval by Lord Hodge in **Halliburton Company v Chubb Bermuda Insurance Ltd** [2020] UKSC 48 at paragraph 122).

28. The same test for apparent bias applies equally to judges, lay members of tribunals, jurors and arbitrators, see **Reg v Gough** p 670. And while the fact that a judge or lay member will have taken a judicial oath is a relevant consideration, it is "*an important protection*" not "*a sufficient guarantee to exclude all legitimate doubt*"; per Lord Reed in **Starrs v Ruxton** 2000 JC 208 at 253 (cited by Lord Bingham of Cornhill at paragraph 18 **Davidson**).

29. In considering whether a judge or lay member who has been assigned to hear a particular case should be recused on the ground of apparent bias, the issue must be resolved by applying an objective test: it is the perspective of the fair-minded and informed observer that is relevant and thus neither the subjective view of the person alleging possible bias, nor the assertions of the person of whom potential bias is alleged, are likely to be particularly helpful, see **Porter v Magill** at paragraph 104. The threshold for recusal is, however, whether the fair-minded and informed observer would conclude there was a "*real possibility*", not whether they would conclude there was a "*probability*"; that means that if there is real ground for doubt, it should be resolved in favour of recusal, see **Locabail** at paragraph 25.

30. As for the construct of the fair-minded and informed observer, as Lord Hope explained in **Helow v Advocate General for Scotland** [2008] 1 WLR 2416:

> "2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real

> possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

31. The determination of the test will always be fact sensitive, as was made clear in **Locabail** at paragraph 25:

> "Everything will depend on the facts, which may include the nature of the issue to be decided."

32. That said, there are some circumstances which could not give rise to an objection, such as the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge or lay member; there are other factors which would not *ordinarily* base an objection, such as a judge's or lay member's social, educational, service or employment background or history, previous political associations, previous judicial decisions or extra-curricular utterances in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers, although it will depend on the facts, see **Locabail** at paragraph 25. Relevantly, in the Employment Appeal Tribunal there is a statutory requirement that in proceedings heard by a judge and two (or four) lay members, there shall be an equal number of employer-representative members and worker-representative members, section 28(6) **ETA**.

33. As for the obligation upon a judge or lay member to disclose matters that may give rise to an objection to their sitting on a case, in **Davidson**, Lord Bingham noted that issues of apparent bias can give rise to particular difficulties and offered the following guidance:

> "19. … It is very important that proper disclosure should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment. When such disclosure is made, it is unusual for an objection to be taken. …"

See also per Lord Hope at paragraph 54, who described such proactive disclosure as "*a badge of impartiality*".

34. On the other hand, in **Helow**, Lord Mance expressed a note of caution on the issue of disclosure:

> "58. … this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. …"

35. Given the fact sensitive nature of apparent bias, there can be only very limited assistance derived from how questions of recusal have been determined in other cases. While I have had regard to the various cases to which I have been referred, I have, therefore, kept firmly in mind that I must decide the recusal question in this instance on the particular facts of this case.

36. As is common ground, however, if I determine that the apparent bias test is met, there is no discretion as to whether a judge or lay member should be recused: they must be, see **Axnoller Events Ltd v Brake** [2021] EWHC 949 Ch at paragraph 52.

Submissions

37. For the claimant it is submitted that the points of challenge in this appeal raise issues as to whether restrictions on the free speech rights of critics of the transgender movement are a proportionate means of achieving a legitimate aim (ground 1) and whether free speech is to be protected notwithstanding that some (such as those holding transgender beliefs) find it offensive (grounds 3, 5 and 6). It is said (relevant to ground 4) that the ET failed to consider how those involved in the relevant decisions made stereotypical assumptions about the claimant's orthodox Christian beliefs, mischaracterising these as homophobic.

38. These are all issues, the claimant submits, that have to be seen in the context of the "*vigorous ongoing debate about transgender rights"* (per Knowles J paragraph 250 **R (Miller) v College of Policing** [2020] EWHC 225 Admin). In particular, the claimant points to the following areas of contention:

(1) In relation to the **Gender Recognition Act 2004** ("GRA"), where there are some who seek reform, such that current gender recognition procedures would be replaced by a self-identification process, whereas others consider that this would undermine legal protections for women and/or that sex cannot be changed and that the proposal for reform raises serious safeguarding issues in schools.

(2) Issues of free speech in the context of transgender rights; in this regard, the claimant notes the observations of Knowles J in **Miller**, where he expressed the concern that:

> "250. … some involved in the debate are readily willing to label those with different viewpoints as "transphobic" or as displaying "hatred" when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research."

> (For completeness, I note that the decision in **Miller** was the subject of a successful challenge on appeal. The Court of Appeal did not, however, disagree with Knowles J's views on the evidence as expressed above; see paragraphs 35-36 **R (Miller) v College of Policing** [2021] EWCA Civ 1926).

(3) The strongly held different views regarding what is referred to as "*conversion therapy*", where there is a deep division on whether any ban introduced in this regard should extend to cover those struggling to come to terms with a felt discordance between natal sex and sense of gender and where organisations such as Mermaids have become associated with a particular side of the debate.

(4) More generally, in relation to the teaching of LGBT issues in schools (this was the subject of the petition referred to by the claimant in her Facebook post).

39. The claimant further makes the point that the context in this instance includes the particular role of a lay member, which would include assisting the judge on matters of secondary fact. The claimant stresses that her objection is not to the lay member's own personal characteristics; her concern relates to how they have expressed their views, which she contends gives rise to the appearance of bias. In particular, the claimant draws attention to the lay member's tweets, as follows:

(1) Those in which the lay member can be seen to be condemning "*gender neutral*" beliefs and those who champion such beliefs, and in which the claimant considers the lay member had signified a willingness to "*block*" or "*no-platform*" those who voice such beliefs (by way of example, the claimant points to the tweet relating to the Middle Temple LGBTQ+ Forum event in November 2021, p 1 Annex A; the lay member's pinned tweet, p 1 Annex A; and the way the lay member described Professor Kathleen Stock, whose evidence had been accepted by Knowles J in **Miller**, p 7 Annex A).

(2) Those evidencing the lay member's involvement in specific campaigns, for example as a trustee of the LGBT Foundation, supporting an objection to the Charity Commissioners' decision to grant charitable status to the LGB Alliance (tweet 2 June 2021, p 15 Annex A), or in taking part in a march on Parliament calling for any "*conversion therapy*" Bill to cover matters of gender identity (tweet 10 April 2022, p 3 Annex A).

(3) Those in which the lay member has taken a clear stand on the provision of transgender affirming education in primary schools and has made apparent their association with the transgender campaigning group Mermaids (in this regard, by way of example, the claimant points to tweets of 25 September 2020, p 2 Annex A; 14 October 2021, p 7 Annex A; 21 February 2022, p 4 Annex A; 2 and 12 June 2021, p 15 Annex A).

40. The claimant also expresses the concern that, although aware of this issue, the lay member chose not to disclose this to the parties. She further questions whether the lay member's responses in this matter have been sufficiently full and forthright.

41. As Advocate to the Court, Mr Donmall has noted that recent Court decisions have indicated that the question of what is "*transphobic*" (an issue that could be seen to be raised by the present appeal) has been seen to be a matter of considerable, and heated, debate (see **Forstater v CGD Europe and ors** [2022] ICR 1 EAT paragraphs 1-2 and **Miller** paragraph 250).

42. In the present case, on the evidence adduced by the claimant, Mr Donmall observed that it might be considered that the lay member had firmly held, and strongly expressed, views on what constitutes transphobia, trans hatred or abuse against trans people (see the tweet relating to the Middle Temple LGBTQ+ Forum event and "*a well known 'gender critical' barrister who champions transphobic causes*", p 1 Annex A; the pinned tweet stating that

"*abuse to or about me, my friends, my colleagues or marginalised communities … includes those who claim to be feminists but exclude or deny trans people or are otherwise not intersectional.*" , p 1 Annex A; the tweet describing Professor Kathleen Stock as a "*notorious #trans hater*", p 7 Annex A; tweets on 9 March 2022 saying "*I dread turning on the radio in case Justin Webb is presenting as I know he will always shoehorn in a transphobic story, just as he did yet again today.* 😢" and on 29 September 2021 stating "*Well done to @DavidLammy for standing up to @BBCr4today's transphobic nonsense*", pp 3 and 7 Annex A).

43. Given such material (although acknowledging that there might be further context to the tweets in question), Mr Donmall submitted:

(1) Firmly held, and strongly expressed, views on what constitutes "*transphobia*" could be considered relevant to at least one of the issues raised by the appeal (see, in particular, ground 6).

(2) The weight of the material might also be seen as giving rise to a question of apparent bias in relation to the claimant's case more generally; certainly the claimant had expressed the concern that the lay member "*is a highly committed transgender activist opposed to everything [the claimant] stands for*" (paragraph 73, claimant's skeleton argument on recusal).

(3) Moreover, some of the tweets in evidence directly relate to the issue of transgender inclusion in schools (see, e.g., pp 2 and the tweet at the top of p 7, Annex A) and others showed support for Mermaids, which might indirectly be considered to relate to trans gender inclusion in schools (see, e.g., the re-tweets at pp 4 and 5 Annex A); this was in the context of an appeal where it was the claimant's case that she had joined into a political debate about what should be taught in schools about transgender issues.

44. Mr Donmall also noted that the lay member themselves had apparently considered whether they had a conflict and had said that they had sought advice from counsel and judicial office holder colleagues; it might be inferred from doing so that the lay member was concerned that others may consider there was a possibility of bias in respect of the appeal. It might also be considered relevant that the intervenor had felt that the Twitter material raised a possible question in this regard (although Mr Donmall considered this was of limited significance). As for whether any weight should be given to the fact that the material was not disclosed by the lay member themselves, it was necessary to exercise caution in relation to this question (per Lord Mance in **Helow**).

Discussion and Conclusions

45. Since 25 June 2013, full appeals before the Employment Appeal Tribunal are heard by a judge sitting alone except where it has been directed that they are to be heard by a judge sitting with two or four "*appointed members*" (section 28(2) and (3) **ETA**). The appointed members are more commonly referred to as "*lay members*" and they are persons "*who appear to the Lord Chancellor and the Secretary of State to have special knowledge or experience of industrial relations either (a) as representatives of employers, or (b) as representatives of workers*", section 22(2) **ETA**. The decision whether the appeal should be listed before a panel that includes lay members requires the exercise of judicial discretion and will inevitably be appeal-sensitive. Thus, where a matter is listed before a three (or, very exceptionally, five) member panel, that will be because the judge has taken the view that the hearing of the appeal would benefit from the knowledge and experience of lay members.

46. Standing in the shoes of the fair-minded and informed observer, I would of course be aware of this important background context when considering the issues raised by the

present application. I would also recognise that the broader experience of lay members, which can be of such value when they are involved in appeals, may also mean that some will express themselves publicly about matters relating to other roles which they hold in their working life or in their community. Provided, however, the lay member concerned ensures that they are not then described by their judicial role or seen as commenting in that capacity, that should not normally give rise to any concern (and see the careful distinctions drawn in the **Guide to Judicial Conduct** ("the Guide") between salaried and fee-paid judges and non-legal members in this regard).

47. In the present instance, none of the material drawn to my attention could have been understood as communicated by the lay member in their capacity as such. As **the Guide** recognises, however, all those who hold judicial office (a term that includes lay members) must also be alive to the difficulties that may arise from extra-judicial activities that might give rise to a reasonable apprehension of bias. Specifically, the question that I have to consider is whether such an appearance of bias arises in the context of the public statements (through their Twitter account) of the lay member in this case. In **Locabail**, in considering the case of the county court recorder in **Timmins v Gourley**, reference was made to the decision of the High Court of Australia, in **Vakauta v Kelly** 167 CLR 568, where complaint was made regarding intemperate remarks made by the judge regarding the medical evidence, in which it was said there was "*an ill-defined line beyond which the expression by a trial judge of preconceived views … could threaten the appearance of impartial justice.*" The question for me is whether the tweets relied on in this instance, given the issues raised by the appeal, cross that "*ill-defined line*".

48. In answering that question, as an informed observer, I would wish to keep in mind the fact that the lay member will have publicly taken the judicial oath. I would recognise that judges may well have their own personal views on issues of public debate but have given

a solemn promise to "*do right to all manner of people*" in accordance with the law when determining any matter before them "*without fear or favour, affection or ill will*". I would also be aware, however, that there is a danger of unconscious bias and, where someone has given public voice to what are clearly very firmly held views relevant to the case before them, I would be more likely to doubt that they would be able to bring an impartial mind to bear on the adjudication of that case.

49. As has been emphasised in argument, it would also be necessary to have regard to the broader context relevant to these proceedings and to the highly polarised nature of the debate relating to some of the issues raised by the appeal. As an informed observer, I would be aware that some who share the claimant's beliefs consider that there are people on the opposite side of the debate who are intolerant of those who do not agree with them and who seek to shut down the expression of views that are different to their own (referred to by the Court of Appeal in **Miller** as "*the 'cancel culture'*", see paragraph 35 [2021] EWCA Civ 1926). That is a view that was held to be supported by the evidence in **Miller** (see per Knowles J at paragraph 250 [2020] EWHC 225; a finding the Court of Appeal adopted, see paragraphs 35-36 [2021] EWCA Civ 1926). Specifically, in **Miller** evidence was cited from Jodie Ginsberg, chief executive officer of Index on Censorship (a non-profit organisation that campaigns for, and defends, free expression) who voiced "*an on-going concern that Twitter is stifling legitimate debate*" on issues relating to proposed reforms to the **GRA** (see, at first instance, paragraphs 247-248 [2020] EWHC 225; and before the Court of Appeal at paragraph 35 [2021] EWCA Civ 1926). Moreover, as the Employment Appeal Tribunal observed in **Forstater**, the issues involved in this debate have "*generated strong feelings*" on both sides. It is notable that, in giving its judgment in that case, the Employment Appeal Tribunal considered it was important to emphasise:

> "2. … it is not the role of this Employment Appeal Tribunal to express any view as to the merits of either side of that debate (which we shall refer to as the 'transgender debate'); its role is simply to determine whether, in reaching the conclusion that it did, the tribunal erred in law. …"

50. As the informed, impartial observer would have noted, the concerns identified in **Miller** can be seen to be similar to those voiced by the claimant in these proceedings. Underlying her grounds of appeal (in particular at grounds 1, 3, 5 and 7) is the claimant's contention that the ET gave inadequate regard to her right to express her legitimately held beliefs. In its determination of the appeal, the Employment Appeal Tribunal will be required to scrutinise how the ET approached the balancing exercise between competing rights in this instance. The claimant objects, however, that the lay member's tweets indicate that they are intolerant of the value judgments she has expressed, as evidenced, for example, by the statement that certain accounts will be blocked. On the evidence of the tweets relied on, in my judgement, that is not a concern that the fair-minded observer could dismiss. Even with an understanding of the importance of the judicial oath, and acknowledging the lay member's own assessment of their ability to reach decisions on "*the facts of a case and pertinent law and nothing else*", a doubt would inevitably arise in the mind of the fair-minded and informed observer as to whether the lay member would in fact be able to approach the task required of the Employment Appeal Tribunal with an entirely open mind.

51. More particularly, it is the claimant's case (see ground 6) that the ET erred in law, or reached a perverse conclusion, in finding that it was reasonable for third parties reading her Facebook posts to consider that she was homophobic or transphobic. On the face of this ground of appeal, therefore, the Employment Appeal Tribunal will be asked to determine whether the ET's factual finding was one that it was properly entitled to reach on the material in question. As the claimant points out, in some respects that material

might be seen as expressing precisely the same views as have previously been characterised as "*transphobic*" in the lay member's tweets. Even allowing for a distinction between views expressed in a private capacity and an exercise of judgment in carrying out a judicial role, that would inevitably give rise to a fear of pre-judgment in the mind of the fair-minded and informed observer, and thus to the conclusion that there was a real possibility of bias.

52. More broadly in this appeal, the Employment Appeal Tribunal will be adjudicating upon the case of a claimant who has made clear her own firmly held beliefs that would seem to stand in direct opposition to the views that have been forcefully and publicly expressed by the lay member. That might be seen as particularly so in relation to the claimant's beliefs relating to sex and relationship education for primary school children (the subject matter of the petition she was seeking to publicise). I do not consider that the fair-minded and informed observer would assume that the lay member would not seek to give the claimant a fair hearing – indeed, I consider they would work on the assumption that the lay member's commitment to their judicial oath (evidenced by their years of public service in other judicial capacities) would mean that they would strive to ensure that they did – but the evidence of the lay member's position on the very issues that are at the heart of the claimant's case must again lead that observer to conclude that there would remain a real possibility of unconscious bias.

53. In reaching these conclusions, I entirely disregard the lay member's personal protected characteristics. As was made clear in **Locabail**, these could not give rise to a proper basis of objection and I accept the claimant's assurance that such matters have not informed her position on this application. In saying that, I acknowledge the lay member's concerns in this regard (as expressed in their initial response to the application), but it is clear that the application has not been put on such a basis and I note that the claimant raised no concerns

as to the composition of the panel until the lay member's tweets had been drawn to her attention (from the cause list, the claimant would previously have been aware that her appeal was due to be heard by myself, sitting with Mx C E Lord OBE and Mr A P Morris).

54. As for the rhetorical question raised by the lay member as to the position of other lay members who might be involved in campaigning activities in other capacities, the answer must be that it would depend on the particular facts of the case; although rare, such concerns have been expressed in other cases (see, for example, **Hamilton v GMB (Northern Region)** UKEAT/0184/06).

55. Finally, I draw no inference from the fact that the material that has given rise to the request for recusal came to light after being discovered by those acting for the intervenor, as opposed to being disclosed by the lay member themselves. I recognise that by failing to proactively disclose this material, the lay member did not gain a "*badge of impartiality*" (per Lord Hope at paragraph 54 **Davidson**). I also appreciate that this was not a case in which it might be said that it had simply not crossed the lay member's mind that there was anything to disclose (the scenario Lord Mance had in mind when considering this question at paragraph 58 **Helow**); that would be inconsistent with the fact that the lay member sought advice from counsel and other judicial colleagues on this question. All that said, the very public nature of the statements in issue means that there can be no suspicion that the lay member was seeking to hide their views from the parties. While I consider that it would have been preferable for the lay member to have pro-actively taken steps to ensure these matters were drawn to the attention of the parties, I do not conclude that their failure to do so should itself suggest any additional cause for concern. For the future, however, I consider the appropriate course would be for a lay member to raise any potential issues of this nature with the judge with whom they are sitting on the case in question. The judge is, after all, likely to be in the best position to act as the fair-minded and informed observer,

with an understanding of the issues to be determined in the case. Even if they do not immediately take the view that the lay member should be recused, the judge will be able to advise as to the appropriate steps to be taken so as to draw any potentially relevant matters to the attention of the parties.

Disposal

56. For the reasons I have given, I am satisfied that if the lay member were to sit on the Employment Appeal Tribunal panel on this appeal, the fair-minded and informed observer could not exclude the possibility of bias. That being so, the claimant's application is allowed and the lay member will be recused from this hearing and another member from the relevant panel will take their place. This matter will now be re-listed for the first available date.