When to sit and when Not to sit

Jeremy Cooper **examines recent case law setting down the guiding principles that should be applied in any tribunal to ensure that objectivity and lack of bias on the adjudicating panel are guaranteed and maintained.**

Objectivity and lack of bias among panel members are essential requirements of an independent tribunal. They form the bedrock of a modern justice system and, without public confidence in their presence, trust in the judicial system is eroded.

As the Tribunals Service grows in size and confidence, the likelihood of individuals developing careers as tribunal judges, and sitting in a number of different jurisdictions, is emerging. 'Cross-ticketing' – where tribunal members are deemed competent to sit in jurisdictions other than those to which they were originally appointed – is a natural and logical way of spreading talent and experience across the Service.

Linked to this development is the increasing possibility that tribunal members might also appear as witnesses or representatives before panels of colleagues with whom they have sat in a different judicial context. Against this background, it is essential that clear rules are laid down and understood to determine the circumstances in which a tribunal member should not sit, to avoid reasonable apprehension of bias in the minds of any of the parties, or other stakeholders in the outcome of the hearing.

Key test

The key test to be applied in any case involving a possible bias challenge was laid down in the House of Lords case of *Porter v Magill* [2002] 2 AC 357 as follows:

> '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.'

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

Lawal

The test was put into sharp effect by the House of Lords in the subsequent case of *Lawal v Northern Spirit* [2003] ICR 856. In this case, counsel appearing for one of the parties before the Employment Appeal Tribunal was also a part-time recorder QC, who had previously sat as an Employment Appeal Tribunal panel chairman with one of the lay members adjudicating the current case.

An objection was raised that this lay member might, albeit subconsciously, be influenced by the fact that he had previously sat with the counsel in question in a judicial capacity. The basis of this assumption was that 'lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge'. If the same judge subsequently appeared as an advocate before that lay member, the lay member might be suspected of bias, induced by the close working relationship of trust and confidence that had developed at the previous hearing(s). Their Lordships concluded, perhaps surprisingly given the robust independence and experience associated with typical tribunal lay members, that there was a real risk of a

perception of bias and that the panel should therefore not have sat.

It is important to stress that this case was decided on the particular facts, and should not be seen as a statement of law that panellists must always stand themselves down if they discover that they have sat on a previous tribunal with the counsel who now appears before them as an advocate. It is more likely that it reflected the particular dynamics of the Employment Appeal Tribunal, which are unlikely to be replicated in other tribunals, before whom senior counsel who are also part-time judiciary rarely appear as advocates.

Further illumination

A third House of Lords case, *Gillies (AP) v SoS for Work and Pensions (Scotland) 2* [2006] UKHL, has added further illumination and commentary on this issue. In this case, the medical member of the tribunal determining appeals against a refusal of the Disability and Carers Service to grant a particular benefit was also contracted as an examining expert medical practitioner to provide reports for the Disability and Carers Service on other cases concerning the same benefit. This House of Lords panel, which was differently constituted from the *Lawal* hearing, had no difficulty robustly refuting the claim that the doctor in question should not have sat for reasons of possible bias. The decision of Baroness Hale (herself once a member of the Council on Tribunals) was particularly forthright. She made four key observations:

1 '[A] relevant fact of tribunal life is that professional people are often called upon to adjudicate upon disputes concerning exactly the same sort of decisions that they regularly make in their own professional practice.'

2 'Expertise on the tribunal not only improves decision-making and reduces the need for outside expertise; it also thereby increases the accessibility and user-friendliness of the proceedings.'

3 'The role of the examining medical practitioner is to provide an independent assessment of whether the claimant meets the criteria for the benefit in question. She has no more interest in denying the claimant a benefit to which he is entitled than she has in granting him one to which he is not.'

4 'I find it difficult to understand what there could possibly be about the facts of tribunal life which lead to a lessening of [a doctor's] professional independence and objectivity at the tribunal stage.'

Thus, the employment of a tribunal member by the same organisation whose decision is being challenged does not lead to automatic disqualification from sitting as a member of that panel under the 'fair-minded and informed observer' test.

This approach was well illustrated in the case of *R oao PD v West Midlands and North West MHRT* [2004] EWCA Civ 311, in which the medical member of the tribunal considering the continuing detention of a patient under the Mental Health Act was employed by the same Trust that was detaining the patient. On the facts of this case, the Court of Appeal decided that there was nothing to suggest that the Trust had any particular interest in the outcome of the case, or that it was in a position to benefit or disadvantage the doctor if it disapproved of the decision. It would only be, for example, if the medical member had worked personally and recently with the staff detaining the patient in the particular hospital that the outcome might have been different.

Same applicant

A different formulation of the 'reasonable apprehension of bias' test will occur when a tribunal member becomes aware that he or she has already sat on a previous case involving the same applicant. In these circumstances, how would the 'fair-minded and informed' observer

see the matter? The first case to address this issue head on was *R v Elligott ex parte Gallagher* [1972] Crim LR 332, where the High Court ruled that there was no principle of law disqualifying a stipendiary magistrate from hearing a case in respect of defendants who had been before him on previous occasions. The issue was next raised in the context of a mental health review tribunal: *R v Oxford Regional MHRT ex parte Mackman* [1986] *The Times*, 2 June. In this case, the president of the patient's tribunal hearing in 1986 was the same person who presided over the patient's tribunal in 1985, with an unfavourable outcome on both occasions. The High Court did not see this as a grounds for disqualification stating on the contrary that:

> 'It might even be arguable that there are advantages in a President sitting on the recurring applications of a particular patient . . . It would be quite wrong for this Court to lay down that in the case of a particular applicant in successive applications . . . the constitution of the tribunal or the person presiding must as a matter of law be changed each time.'

The same principle was applied more recently in *R oao M v MHRT* [2005] EWHC 2791, in which the judge who presided over a patient's MHRT hearing in 2004 had been the sentencing judge at the patient's trial the previous year. The High Court had no difficulty dismissing the patient's application to quash the tribunal decision on the grounds of possible bias stating inter alia that:

> 'The fair-minded and informed observer would not attribute to the judge an inability or reluctance to change his mind when faced with a rational basis for doing so . . . The proceedings before the tribunal were quasi-adversarial. Oral argument pays a vital role in promoting a change of mind of the Tribunal or one or more of its members.'

The case of *Sengupta v Holmes* [2002] EWCA Civ 1104 had expressed these concepts even more flamboyantly. In this case, an appellant had been refused permission to appeal to the High Court by Laws LJ, sitting as a single judge. This refusal was then overturned by another judge, and the appeal was listed for a full substantive hearing. In answer to the question 'Could Laws LJ sit on the substantive appeal hearing, having turned down the request for an appeal?' the Court of Appeal ruled, yes he could. For the Court of Appeal were of the opinion that the 'fair-minded and informed' observer would recognise that:

> 'Absent special circumstances a readiness to change one's mind upon some issue, whether upon new information or simply on further reflection, and to change it from a previously declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of all professions, indeed of the experience of all thinking men and women.'

Waiver

Finally, it should be noted that the right to an impartial tribunal that is enshrined in all of the above case law can, in principle, be waived if 'all the circumstances which give rise to the objection are known to the applicant and the waiver is unequivocal': *Millar v Dickson* [2002] 1 WLR 1615. So if it is brought to an applicant's attention that the *Porter v Magill* test, when applied to a member of their tribunal, might result in a finding of possible bias, but they choose to proceed with their hearing in any event, a subsequent bias challenge would not be permitted by the courts.

Successful challenge

So far this article has concentrated primarily on cases in which a bias challenge was not upheld by the courts. In contrast, there have been cases in which the application of the 'bias test' has led to a different conclusion. Two such cases deserve particular scrutiny.

The first is the extremely well-known case of *In re Pinochet (No 2)* [2000] UKHL 2. In this case, the eminent Law Lord, Lord Hoffman, sat on the Appellate Committee which ruled that the Chilean citizen Senator Pinochet was not entitled to rely upon his earlier status as Head of State in Chile to provide him with immunity against suit in the United Kingdom. Amnesty International (AI) was a party to these proceedings.

It was subsequently revealed that Lord Hoffman was a Director of Amnesty International Charity Ltd (AICL), a registered charity incorporated to undertake charitable aspects of the work of AI.

The House of Lords sitting a second time on the same case decided that 'AI and AICL are . . . parts of an entity or movement working in different fields towards the same goals'. As a consequence, the House of Lords ruled:

> 'If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved . . . in promoting the same causes in the same organisation as is a party to the suit.'

. . . a High Court judge discovered on the eve of a trial over which he was to adjudicate that he was personally acquainted with a potential witness in the case . . . and this acquaintance was profound and of long duration.

This principle of law is absolute and is not dependent upon establishing any actual or apparent bias on the part of the judge in question. More, it is a restatement of Lord Hewart's famous dictum in *Rex v Sussex Justices ex parte McCarthy* [1924] KB 256, 259:

> 'It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

Or in the words of Lord Nolan's judgment in the *Pinochet* case:

> 'In any case where the impartiality of a judge is in question, the appearance of the matter is just as important as the reality.'

The second important case to address the same issue was the case of *AMG Group Ltd v Morrison* [2006] EWCA Civ 6. In this case, a High Court judge discovered on the eve of a trial over which he was to adjudicate that he was personally acquainted with a potential witness in the case who had been a director of the applicant company, and this acquaintance was profound and of long duration. For a number of reasons the judge declined to stand himself down, and a bias challenge was issued by one of the parties.

The Court of Appeal upheld the challenge. They gave a number of cogent reasons why the judge should have stood down following the challenge. Not least was the fact that the judge had openly acknowledged that having know the witness for 30 years, he would have had 'the greatest difficulty where a challenge was to be made as to the truthfulness of his evidence'.

Of particular note was the Court of Appeal's statement that:

> 'Inconvenience, costs and delay do not . . . count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice . . . If on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision.'

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