IN THE INDUSTRIAL TRIBUNAL FOR GIBRALTAR

Ind Tri 16/2008

BETWEEN

JOSE LUIS PINCHO

Complainant

-and-

SECRETARY OF STATE FOR DEFENCE

Respondent

Mr Kenneth Navas for the Complainant

Mr Mark Isola and Ms Samantha Grimes for the Respondent

1. BACKGROUND & CHRONOLOGY

1.1 The Complaint for unfair dismissal in this matter was filed on the 28th May 2008.

1.2 Pursuant to Rule 7 (2) of the Industrial Tribunal Rules on the 23rd June 2008 I was appointed Chair for the purposes of hearing the Complainant's application for unfair dismissal.

1.3 The first direction hearing was listed for the 23rd September 2008. The parties attended and directions were given regarding disclosure of documents. A further direction hearing was listed for the 10th November 2008;

1.4 On the 6th November 2008 the parties wrote into the Tribunal confirming that disclosure had taken place and requesting that the direction hearing listed for the 10th November 2008 be vacated to enable them to consider the disclosure documents and to meet on a without prejudice basis to explore the possibility of an amicable settlement. The request for an adjournment was granted on 7th November 2008 and another direction hearing was set for the 10th December 2008.

1.5 On the 9th December 2008 the parties once again wrote in to ask for an adjournment to January 2009 to allow some more time for ongoing without prejudice discussions and avoid unnecessary costs in the meantime. The adjournment was once again granted.

1.6 The parties did not formally thereafter request a further date and the Tribunal re-listed the application for the 2nd April 2009. At the said hearing directions were given for trial as follows:

1.6.1 Exchange of witness statements by 2nd July 2009;
1.6.2 Exchange of skeleton arguments by 21st July 2009;
1.6.3 Filing of agreed bundle of documents and authorities by the 28th July 2009;
1.6.4 Hearing date of the substantive action from the 5th to 9th October 2009.

1.7 At each attendance after directions had been given I specifically asked the parties if there were any other issues they wished to raise. No issues were raised at either the hearings or in correspondence.

1.8 In an attempt to actively case manage the matter on the 3rd July 2009 I asked the Secretary to the Tribunal to enquire of the parties as to whether they had complied with the direction given on exchange of witness statements as no statements had been filed with the Tribunal.

1.9 The Secretary communicated by letter dated 7th July 2009 that the parties had agreed for exchange of witness statements to be delayed to early August without reference to the Tribunal. I asked the Secretary to communicate to the parties that if there was a difficulty with complying with directions they should advise the Tribunal and submit a draft Order with proposed changes for my consideration. The concern throughout being the impact that such a delay could have on the October hearing.

1.10 By letter dated the 14th July 2009 the Respondent's solicitors stated that it had come to their attention that I was acting for another Complainant, Charles Buhagiar (*"the Buhagiar case"*), in an unfair dismissal claim against the Respondent, it was alleged that both claims were very similar and that the Respondent intended calling almost identical witnesses. In the circumstances they contended that my appointment as Chair was not appropriate as they believed that I was conflicted (*"the recusal application"*). The letter also contained a request for an adjournment of the substantive hearing due to the absence of the Respondent's Counsel from Gibraltar on the dates set which was subsequently abandoned.

1.11 It is a matter of record that I have always acted in the *Buhagiar* matter, the Originating Application having been filed on the 21st December 2007, some 6 months before my appointment in this matter. It is also a matter of record that Ms Samantha Grimes has always acted for the Respondent in both matters.

1.12 The Respondent was asked to file the grounds of objection and both parties were asked to file skeleton arguments ahead of the hearing, which took place on the 12th August 2009. At the request of the parties at the said hearing a further Order extending the directions for trial was entered. I reserved judgement on the recusal application.

2. THE RESPONDENT'S SUBMISSIONS

2.1 The Respondent filed Grounds of Objection on 4th August 2009 as follows:-

2.1.1 The present case is listed for hearing from 5th to 9th October 2009;

2.1.2 The Buhagiar case is listed for hearing from 13th to 15th October;

2.1.3 The Buhagiar claim is very similar to the present claim 1) in terms of the facts surrounding the claim, 2) the nature of the claims made and 3) virtually identical witnesses are to be called to give evidence.

2.2 Although no actual or conscious bias is suggested the Respondent believes there is a real risk of bias, although it is not necessarily a probability.

2.3 On that basis the Respondent submits that I will not be able to determine the claim properly and/or to deal with the claim fairly if I continue as Chair.

3. THE COMPLAINANT'S SUBMISSIONS

3.1 The Complainant's position in respect of the recusal application is set out in the Skeleton Arguments lodged on the 4th August 2009 which in brief are as follows:-

3.1.1 The onus is on the Respondent to satisfy the Tribunal of the merits of the recusal application;

3.1.2 The Complainant has no objection to my continued appointment and does not support the recusal application;

3.1.3 Whilst not privy to the facts in the Buhagiar case he has confidence on my ability to discharge the functions of my office without bias of any kind.

3.2 In brief the Complainant adopted a neutral stance.

4. THE ISSUES

4.1 This is a matter that has required very careful thought and consideration. A recusal application based on bias whether actual or apparent is a serious matter that cannot be taken lightly.

4.2 It has involved a balancing exercise between the duty not to ignore a substantive objection which could potentially offend the rules of natural justice and undermine public confidence and the duty not to accede to a tenuous or frivolous application or indeed one that the objecting party can be said to have waived or acquiesced to as that would similarly undermine public confidence. One has to be mindful of the fact that the net effect of giving in too readily to such applications, particularly in a jurisdiction such as Gibraltar, is to effectively allow parties to choose who they wish to be appointed as Chair. Furthermore, unless the objection is taken at the earliest possible opportunity it can lead to delay in determination of the matter.

4.3 In considering the issues and as more particularly stated hereunder I have asked myself the following questions:-

4.3.1 Is there a real risk of apparent bias? If there is not then the application is to be dismissed.

4.3.2 If I am persuaded that there is a real risk then I still need to consider whether the objection has been waived or acquiesced either expressly or by implication? If not then I should recuse myself.

4.3.3 If the objection has been waived or acquiesced I still have to ask whether the matter is such where public interest demands that the waiver be set aside and a recusal follow?

5. THE LAW

5.1 It is trite law that the rule against bias forms part of the principles of natural justice. That no one should be a judge in his own case and that justice should not only be done but seen to be done are essential elements of the judicial process.

5.2 To say that a person is biased means that he or she *"is motivated by a desire unfairly to favour one side or disfavour the other"* ***per Lord Goff of Chievely in R -v- Gough (1993) AC 646*** at page 659 e.

5.3 As declared in ***Gough*** there is only one established category where the law assumes bias and that is when the Tribunal has a pecuniary or proprietary

interest in the subject matter of the proceedings. Actual or conscious bias is not alleged in this instance. In the absence of such an allegation the court should hesitate long and hard before creating any special category.

5.4 The Respondent is alleging that although there is no actual or conscious bias there *"is a real danger of bias and that it is a real possibility, although not necessarily a probability"*(***per para 2 of the Respondent's skeletal arguments***).

5.5 It follows from the above that in submitting that there is a real danger of bias the Respondent is effectively saying that I have a preconceived opinion or a pre-disposition or pre-determination to decide the case against the Respondent. The essence of the allegation is that I cannot make an objective decision on the basis of evidence on record as my mind is not open to conviction and as such I am unable to exercise impartiality.

5.6 The relevant test for apparent bias was set by HL in ***Porter -v- Magill (2002) 2 AC 357, Lord Hope*** at para 110:

"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

5.7 The idea was expressed by Kirby J in ***Johnson -v- Johnson*** (referred to in ***Lawal -v- Northern Spirit Ltd (2003) ICR*** when he stated that

"a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".

5.8 The decision is to be made on the basis of the facts and circumstances of the individual case.

5.9 In submissions Counsel for the Respondent addressed me on para 25, page 77 of the case of ***Locabail (UK) Ltd -v- Bayfield Properties (2000) 1 ALL ER CA*** , which I repeat hereunder:-

"*It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on* ..... ***previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him***;..... *By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that*

person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind in a later occasion; or if on any question at issue in proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a precious case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which objection is raised, the weaker (other things being equal) the objection will be".

5.10 I concur with Counsel for the Respondent that the above paragraph is central to the decision in ***Locabail*** and I have derived assistance from it in formulating my decision.

5.11 After considering all the arguments raised by the Respondent and the authorities and after applying the reasoning above to this case I conclude the following:-

5.11.1 this matter is precisely one in which I had previous instructions to act in a case against a Respondent who is now engaged in a case before me so per se that does not preclude me from determining the case.

5.11.2 It all depends on the facts and circumstances of the case which I need to consider.

5.11.3 Although it is alleged that the cases are very similar judging from the analysis set out in the Respondent's skeleton argument the main similarity is that they both concern dismissals on the grounds of ill-health but this is not uncommon to many other cases;

5.11.4 There appears to be no connection between the two Complainants or the facts giving rise to the decision to dismiss either one. In brief the *Buhagiar* case concerns an employee suffering from depression who contends that he should have been medically retired and not dismissed. In contrast in the present case the Complainant alleges to have sustained an accident at work making him unfit to return to his job in circumstances in which it is alleged that in the interim his position was deemed to have become surplus to requirements. On a general analysis the facts are therefore different;

5.11.5 In any case no two cases are ever the same, they each have their own factual matrix and are to be determined on its own merits. My determination in this matter will have no impact on the

determination that a different Chair in the Buhagiar matter may have, the Industrial Tribunal is not bound by previous decisions;

5.11.6 On the subject of the witnesses, 3 witnesses are identical. Catherine Cleverly is the caseworker in both; Richard Hermida is the Chair of the Departmental Review Board in both and Peter Cartwright is the deciding officer in the current case and the chair of the medical appeal hearing in the current case. However, save for Catherine Cleverly the capacity in which they are witnesses is different. Indeed the evidence that each will give in respect of the matters will inevitably be fact specific to the case that they are concerned with and thus different. The issue is whether the steps taken in each case were reasonable in the circumstances, what may be reasonable in one case may be unreasonable in another. The witnesses conduct would be measured against objective standards;

5.11.7 In ***Locabail*** the Court went as far as to say that "*the mere fact that a judge, earlier in the same case or in a precious case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection*". This case does not even touch on such a scenario where it is the same Judge hearing the same witness in two cases before it and finding the witness unreliable. I am adjudicator in one but not in the other.

5.11.8 Furthermore, throughout the proceedings I have not conducted myself in any way so as to create doubt on my impartiality.

5.12 For the reasons set out above I am not persuaded that I should recuse myself in this matter.

6. WAIVER/ACQUIESCENCE

6.1 Even if I were to have ruled that the possibility of apparent bias exists the right to challenge proceedings conducted in breach of the rule may be lost by waiver, whether expressly or by implication. At the hearing I specifically asked Counsel for the Respondent to address me on this point.

6.2 In circumstances in which there is a breach of the principles of natural justice waiver defeats the right of a party affected to found on it.

6.3 An objection may be inferred to have been waived if it is established that the party alleging bias:

6.3.1 knows that the adjudicator is disqualified because of bias; or

6.3.2 knows that he has a right to object thereto; or

6.3.3 he acquiesces in the opportunity by failing to take an objection at the earliest opportunity.

6.4 The issue of waiver is addressed in the case of ***Locabail*** to which Counsel referred me to and my view as to it's application is further fortified by the following extract in ***Volume 1 (1) of Halsbury's Laws, 4th edition,*** page 101, which reads

"the right to challenge proceedings conducted in breach of the rule against bias may be lost by waiver, either express or implied. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. However, once these conditions are met a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest possible opportunity".

6.5 When applying the legal test to the facts I ask and answer the questions as follows:-

On the assumption that there is a case for apparent bias did the Respondent have the requisite knowledge?

6.5.1 In this instance the alleged ground of objection existed from the outset. The Respondent was well aware of my involvement in the Buhagiar matter well before the Originating application was lodged before the Tribunal on 21st December 2007. To my knowledge their Solicitors became aware shortly after that date when they were instructed to file a notice of appearance and for over 6 months before my appointment as Chair in this matter came about.

6.5.2 For almost 13 months from the date of my appointment in June 2008 they were in a position to raise the objection with me. The onus was on the Respondent and his solicitors as they were the only ones privy to all the information so as to make any form of connection between the claims. I say this for the following reasons:-

6.5.2.1 The solicitors in both cases are the same. It is not even a situation in which it is the same Firm but different practitioners.

6.5.2.2 They were the only party privy to all the information in that not only did they know the facts of each case but knew whom the proposed witnesses were to be.

Did the Respondent have knowledge of the right to object?

6.5.3 The Respondent has been advised by solicitors throughout and therefore knowledge of the right to object must be imputed.

Have they acquiesced in the opportunity by failing to take objection at the earliest possible opportunity?

6.5.4 Either bias is apparent or it is not. It follows from the above that the reasonable course of conduct for a party reasonably apprehensive of bias is to allege a violation of natural justice at the earliest possible opportunity.

6.5.5 There has been serious delay on the part of the Respondent in raising the issue of bias. They seek my recusal from the case some 13 months after my appointment in circumstances in which there has been plenty of opportunity to raise this either at the direction hearings or in correspondence particularly after being asked at each attendance whether any further issue arose that I needed to address. Final directions were given as far back as the 2nd April 2009.

6.5.6 They were the only ones privy to the information. The alleged similarity of the issues and the fact that there were common witnesses. Notwithstanding, at no stage throughout a 13 month period was any objection raised. Instead they participated fully in the matter and we proceeded to have the matter listed for hearing. What the Respondent cannot do is to say that the matter is obvious when with full knowledge of the facts they sat back and did nothing for 13 months.

6.6 In the circumstances they must be taken to have waived any right to object.

7. PUBLIC INTEREST

7.1 Notwithstanding the Respondent's waiver of the objection if this was a case of a blatant display of bias, which would undermine public confidence this would militate against my recusal as it would be a matter of public concern but that is not the case here.

7.2 The case does not in my view raise any issues of wider public interest so as to militate in favour of my recusal.

8. CONCLUSION

8.1 When I accepted appointment as Chair of the Industrial Tribunal I was conscious of my duty to render justice without fear or favour. I have no doubt of my ability to act fairly and with an open mind to the arguments presented by both sides. There has been nothing in my conduct since

appointment to give a different impression. I did not believe and still do not believe that there is any danger of bias.

8.2 The fact that I had accepted previous instructions to act in an unfair dismissal claim against the Respondent, based on ill health, is per se not enough for me to disqualify myself from adjudicating in this matter and I am not persuaded by the further arguments adduced. My determination of the issues in this case will have no bearing nor create any precedent that would affect the outcome of the other matter;

8.3 I have throughout my years of practice acted for an equal measure of both Employers and Employees.

8.4 It is implicit in the Respondent's conduct that they have acquiesced to this as this situation has been present from the outset and no objection has been taken until 13 months after my appointment;

8.5 The case is a run of the mill unfair dismissal case on the grounds of ill health. It raises no issues that would lead me to believe that there are greater public interest considerations for me to recuse myself.

8.6 In the circumstances I decline the Respondent's application for recusal.

Gillian M Guzman
Chairperson

14th September 2009

ADDENDUM

As the parties are aware whilst deliberating on this matter and so as to avoid the prompting of any further correspondence I have specifically not been involved in the Buhagiar case nor have I been involved in considering any substantive matters concerning this case as I specifically asked the Secretary of the Tribunal to refrain from sending any witness statements to me until my decision was announced. As it happens I am due to be away from Gibraltar on the dates of the Buhagiar matter and thus will not be dealing with the substantive action in any event. My decision however has been premised on the basis as if I had continued to act, although this is no longer the case.