

BETWEEN:

ANTHONY WALLACE

Claimant

-and-

SEFAT DISTRIBUTION AND SAMUEL ATTIAS

Respondent

DECISION

Background Facts/the Claim

1. The Claimant's claim is for constructive dismissal against his employer, Sefat Distribution Limited, and Mr Samuel Attias, Mr Attias being the sole director and a 25% shareholder of Sefat Distribution Limited.
2. The Claimant alleges unreasonable behaviour over a number of years on the part of the Respondents causing the Claimant to have increasing levels of stress and anxiety in the course of him carrying out his delivery and other duties and having to address constant complaints from the Respondents customers, some of them threatening, without any proper support from the Respondents. As a consequence of this the Claimant went off on sick leave. The Claimant further alleges that this was a deliberate course of action on the part of the Respondents designed to push him to his limits and as a consequence of which he had to resign. Part of the Claimant's complaint includes the following:-

"I was forced to collect personal items for his family members, and their businesses.

Mr Attias would make me do certain jobs for his father's Company eg taking files and clearing out the Storeroom, recycling, Tax Office, car service for his father and brother.

I complained about doing jobs for another Company, in his bullying manner said "I'm your boss and you do what I say".

My Contract states I am employed as a courier/messenger by Sefat Distributions and no one else".

3. The Response alleges that having tendered his resignation on 10th December 2018, the Claimant sent a WhatsApp to Mr Samuel Attias on 12th December 2018 asking to meet with him which they subsequently did at Sefat Distributions Limited's offices where the Claimant expressed regret for his decision to resign and asked for his job

back. Mr Attias informed him would not be possible because they had employed someone to replace him. Part of the Response includes the following:-

“Sefat had numerous clients on their books with Serfaty & Co and Castiel Winser being two of them. When he was asked to do messenger work for them he was actually doing work for two of Sefat’s clients”.

CMC

4. At the first Case Management Conference Hearing (CMC) of this Claim on 10th December 2020, there was a delay with the start of the hearing because Mr Samuel Attias, who was representing the Respondent and himself in person, was not present. Prior to his arrival, a person known to me as Mr Eli Attias, entered the Employment Tribunal and explained that he was the brother of Mr Samuel Attias, and that Mr Samuel Attias was on his way but had been delayed. Mr Eli Attias confirmed that he was attending to accompany his brother, but not as his representative.
5. On Mr Samuel Attias arriving the CMC hearing commenced. I immediately brought it to the attention of the parties that I had acted on a single legal professional matter for Castiel Winser Financial Consultants Limited in 2016/2017, and had in the course of that single legal representation taken instructions from Mr Eli Attias and with whom I enjoyed a good professional relationship with. I had not previously appreciated or known that Mr Samuel Attias or Sefat Distribution Limited had any connection to Castiel Winser Financial Consultants Limited. As neither party was legally represented, and there had been various delays with the setting down of a CMC, I informed the parties that I would proceed to give the directions, and list the claim for a substantive hearing, with permission to either party to apply, and in particular for the Claimant if he felt that my prior professional relationship with Castiel Winser Financial Consultants Limited raised issues of concern on his part of apparent or actual bias such that I should consider recusing myself as Chairperson.

Application for Recusal

6. Following the hearing, the Secretary of the Employment Tribunal received an e-mail of 11th December 2020 from the Claimant which stated the following:-

“I would like thank you for the meeting yesterday but on reflection I feel I have an issue.

The Chairman stated that he represented/was part of a case with Castiel Winser before.

I know at the time the Chairman said it should not reflect on our case as he has not dealt with Samuel Attias in connection with Castiel Winser, but we believe it will be a conflict of interest as Mr Attias is employed by Castiel Winser and has been for many years - I believe he has shares in his fathers company.

As our case is against Mr Attias - Sefat Distributions, our lawsuit also has a mention of Castiel Winser in our statement including the brother who also attended the meeting yesterday.

Please could you consider our issues and appoint another Chairman who has had no dealings with the Attias family or Castiel Winser.

Regards

Mr Wallace”.

7. The Secretary of the Employment Tribunal then wrote to Mr Samuel Attias on 11th December 2020 to the following effect:-

“Dear Samuel

Please read email below

Would you please confirm within the next 7 days whether you are or have at any stage been

- (a) employed by Castiel Winser, and if so, for what period or periods of time;*
- (b) a shareholder of Castiel Winser, and if so, for what period or periods of time;*
- (c) his views on the Claimant’s application; and*
- (d). who the shareholders and directors of Sefat Distribution Limited are and whether they are also shareholders and directors of Castiel Winser Limited in whole or in part.*

Once you have responded, and neither side wishes to add anything further to their representations the Chairperson will then make a decision on this application for him to step down on the basis of those written representations without an oral hearing unless either side wishes to have one

Thanking you”.

8. On 16th December 2020 Mr Attias replied to the following effect:-

Dear Susan

Further to your email on the 11th December I will answer your questions:-

- a) I am presently employed by Castiel Winser and have been for the last 10 Years.*
- b) I am not and have never been a shareholder of Castiel Winser.*
- c) With regards to the claimants application of replacing the chairperson, I feel it is extremely rare that due to the size of Gibraltar and the business/personal community that there would be another chairperson that would not have had any dealing with a family as large as ours at some point in time and therefore in most instances the same issue would arise.*

I feel that individuals who have been appointed as Chairpersons for the Employment Tribunals, would have been vouched and would be professional enough to be impartial, especially in this case, that the Chairperson only represented a company belonging to a family member of mine (not my company) and on only one occasion.

d) Shareholders of Sefat Distributions are Mesod William Serfaty, Giacomo Medici, Elias Attias and Samuel Attias. Samuel Attias is the Sole Director. None of the above shareholders of Sefat Distributions are either Shareholders or Directors of Castiel Winser, except for Mr. Elias Attias whom is not a shareholder and has never been, but is the Managing Director of Castiel Winser.

I hope the above clarifies all points raised.

Please do not hesitate to contact me for any further information or clarification you may need.”

9. On 17th December 2020 the Claimant responded:

“Thank you for your response and Mr Attias email.

As Mr Samuel Attias and Mr Elias Attias (brother) are both linked to Sefat Distributions as Castiel Winser I am still requesting if it is possible for the chairman to stepdown.

I'm aware of the size of Gibraltar, but Im sure there will be someone else to take the chairmans place.

Also, please could you forward me the dates of submissions of documents which need to be submitted before the hearing date.”

10. The shareholders and directors of Sefat Distributors Limited are:-

Shareholders: Giacomo Medici, Mesod William Serfaty, Eliyahu Attias and Samuel Attias;

Director: Samuel Attias.

11. The shareholders and directors of Castiel Winser Financial Consultants Limited are:-

Shareholder: Seld Holdings Limited.

Directors: Eliyahu Attias and Michelle Garcia.

12. The shareholders and directors of Castiel Winser Trust Limited are:-

Shareholder: Seld Holdings Limited.

Directors: Eliyahu Attias and Michelle Garcia.

13. The shareholders and directors of Seld Holdings Limited are:-

Shareholders: Isaac Sydney & Mercedes Attias;

Directors: Mercedes Attias and Eliyahu Attias.

Apparent bias

14. It is a fundamental rule, often expressed in the maxim *nemo iudex in causa sua*, that, in the absence of statutory authority, agreement or necessity, no person may be a

judge in his or her own cause. At common law this rule is applied in two broad classes of case. First, where an adjudicator has either a direct pecuniary or proprietary interest in the outcome of the matter, or can otherwise by reason of a direct personal interest be regarded as being a party to the action. That is not the case here, and does not form part of the Claimant's application. Secondly, where either by reason of a different form of interest or by reason of his or her conduct or behaviour there is a 'real possibility' of bias on the adjudicator's part or of "apparent bias" (*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465[1993] AC 646). It is the issue of apparent bias that I need to consider and determine.

15. Bias has been described as a departure from that standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office: *Franklin v Minister of Town and Country Planning* [1948] AC 87 at 103, [1947] 2 All ER 289 at 296, HL, per Lord Thankerton). It has been described to include 'an inclination or a pre-disposition to decide the issue only one way, whatever the strength of the contrary argument' (*Davidson v Scottish Ministers* [2004] UKHL 34 at [47]). In other words, a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue.
16. In determining whether there is apparent bias, the Employment Tribunal is required:-
 - a. To inform itself about all the circumstances which relate to the suggestion that the decision-maker is biased. It must then ask whether those would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased (*Porter*, supra). "The opinion of the notional and fair-minded observer is not to be confused with the opinion of the litigant": *Harb v Aziz* [2016] EWCA Civ 556 per Lord Dyson;
 - b. To take a precautionary approach to recusal (*Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515 at [39], [2014] 1 WLR 1943 per Sir Terence Etherton; and at [41]: "the decision made by a judge where or not to accede to an objection based on apparent bias is a 'multi-factorial decision' and it is wrong for a tribunal to refuse to continue to hear a case merely because a party alleges bias": *Automobile Proprietary Ltd v Healy* [1979] ICR 809, EAT;
 - c. The fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious': *Johnson v Johnson* (2000) 174 ALR 655 at [53], (2000) 201 CLR 488 at [53] per Kirby J, cited with approval;
 - d. To look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or to the hypothetical observer at the time of the decision: *Condon v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] LGR 87, [2007] 2 P & CR 38. The hypothetical objective observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available. They are treated as being well-informed and having extensive knowledge.

17. A prior professional relationship with a party can constitute grounds of apparent bias if a fair minded and informed observer could conclude that there is a real possibility of bias or that the adjudicator cannot give a fair hearing due to this. In *Smith v Kvaerner Cementation Foundations Ltd (General Council of the Bar intervening)* [2006] EWCA Civ 242, [2006] 3 All ER 593 the recorder due to hear the trial was the head of the chambers to which both counsel for the claimant and for the defendant belonged and the recorder had acted for the defendant, or associated companies, in the past and might do so again in the future. It was held that the mere fact that counsel and the recorder were in the same chambers did not, of itself, give rise to an appearance of bias nor was a fair trial put at risk merely because it was presided over by a recorder who was the head of chambers of counsel appearing before him. However, as the recorder considered the defendant to be a longstanding and current lay client, the recorder should not have tried the claimant's case unless the claimant waived his right to object to him doing so. In paras [20][21] of the Judgment, reference is made to Lord Denning's judgment in *Metropolitan Properties Co (FGC) Ltd v Lannon* where he states:-

"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding. Everyone would agree that a judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party (emphasis added). Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased."

18. Smith sets out examples that would not give rise to questions of apparent bias [para 25]:-

"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 (emphasis added) the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him (emphasis added); or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6#8 8/91)). 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 on any later occasion; or if on any question at issue in the 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 judicial mind (see Vakauta v Kelly (1989) 167 CLR 568); 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 previous 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. In most cases, we think, the answer, one way or the other, will be obvious. 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 the objection is raised, the weaker (other things being equal) the objection will be (emphasis added)."

19. I must decide this application on the facts and circumstances of this individual case and on the basis of the test set out in paragraph 16 of this Decision. On the one hand, Castiel Winser Financial Consultants Limited is not a party to this Claim. I have acted for it in a single past professional engagement only as a consequence of its usual lawyers being conflicted in a matter, and I have had no on-going professional relationship with that company since late 2017 when the matter I was professionally dealing with concluded. Castiel Winser Financial Consultants Limited is not, therefore, an existing or longstanding client of mine, and my interest as the adjudicator is therefore remote, and it could be argued that there is therefore little or no likelihood of bias: see *Leeds Corpn v Ryder* [1907] AC 420, HL. Nor should the fair-minded objective observer be unduly "sensitive or suspicious" (see para.16(c) above).
20. On the other hand, the fair-minded objective observer should not be "complacent" (see para.16(c) above). Mr Samuel Attias is employed by Castiel Winser Financial Consultants Limited, but is not a shareholder or director of that company. His brother Mr Eli Attias, from whom I took instructions when engaged by Castiel Winser Financial Consultants Limited, is not only a director of Castiel Winser Financial Consultants Limited, but also a shareholder of Sefat Distribution Limited. Part of the grounds for the Claim for constructive dismissal relate to the duties the Claimant alleges he was unreasonably required to carry out by the Respondent for Castiel Winser Financial Consultants Limited and family members of Mr Attias, which might well include his brother Mr. Eli Attias. Moreover, the events surrounding this Claim relate to a resignation on 10th December 2018, and the series of events that predated that resignation and ultimately led to the Claimant's resignation. I was probably still acting for Castiel Winser Financial Consultants Limited during part of those events, and even if I was not, those events would have been very close in time to the period I was professionally acting for Castiel Winser Financial Consultants Limited. Nor, given the nature of the prior instructions, it is a remote possibility that I might be instructed to act again in the short to medium term on behalf of Castiel Winser Financial Consultants Limited.
21. Whilst it would therefore be wrong to recuse myself too quickly in relation to a prior professional relationship of this nature, and I am not entirely satisfied that the grounds for recusal are clear and obvious having last acted for Castiel Winser Financial

Consultants Limited in late 2017, I do have ground for doubt. That doubt should be resolved in favour of recusal. It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Without expressing any view on the merits or otherwise of this Claim, this unrepresented Claimant may fail in the pursuit of this Claim, and thoughts that the Employment Tribunal might have been biased against him can become festering sores for any disappointed litigant. Whilst very finely balanced, I must decide to recuse myself from hearing this Claim for the reasons stated.

A handwritten signature in blue ink, consisting of several large, sweeping loops and curves, positioned above the printed name.

Mark Isola QC
Chairperson