

EAT overturns ET decision on grounds of Judge's appearance of bias

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Rolec (Electrical and Mechanical Services) Ltd v Mrs J Georgiou [2023] EAT 46

1. Mrs J Georgiou, brought a claim in the Employment Tribunal ('ET') for constructive unfair Dismissal. She succeeded at first instance, the Respondent employer, Rolec (Electrical and Mechanical Services) Ltd, appealed to the Employment Appeal Tribunal ('EAT') against the decision on the basis that the ET appeared to show bias.
2. Mrs Georgiou is referred to as the Claimant ("C") in this summary, and Rolec is referred to as the Respondent ("R").

The Claim

3. R had deferred or cancelled a meeting on 24 January 2019 to discuss C's position, scheduled in circumstances where the part of the business C worked for was to be sold. The Employment Tribunal ("ET") considered that due to the conduct of her managers and directors, C had been 'on tenterhooks concerning her future' since 7 December 2018. The ET found the cancellation of the meeting on 24 January 2019 to be a repudiatory breach of the implied term of trust and confidence. If this was not sufficient to amount to a repudiatory breach, it was part of a course of conduct that, taken cumulatively had amounted to a repudiatory breach. The ET, therefore, found that C had been constructively dismissed.

Grounds of the Appeal

4. R's case for appeal on the ground of apparent bias or predetermination was that:
 - a. The Employment Judge's ("EJ") interventions during cross-examination of C suggested pre-judgment and disrupted the fair conduct of cross-examination.

- b. Unfair and hostile EJ interventions during R's witness' evidence and in recall and cross-examination of C.
 - c. The EJ's approach to matters where the R' witness had not been challenged displayed apparent bias and/or pre-determination.
5. C resisted R's appeal on the basis that:
- a. R's solicitor, Mr Jones, was hostile and aggressive.
 - b. EJs intervention in Mr Tyler's evidence was warranted due to inconsistency.

Relevant legal principles

6. The following legal principles were relevant to the EAT's consideration of the appeal:
- a. A tribunal must not pre-determine the decision it is required to reach (*R on the application of Persimmon Homes Limited and anor v Vale of Glamorgan Council* [2010] EWHC 535)
 - b. A fair hearing before an independent and impartial tribunal requires that the facts would not cause a fair-minded and informed observer to consider there was a real danger of bias on its part (*Porter v Magill* [2002] UKHL 67, [2002] 2 AC 357)
 - c. The appearance of bias is enough, and the appearance of bias may be demonstrated by the manifestation of a closed mind (*Jiminez v London Borough of Southwark* [2003] EWCA Civ 502, [2003] ILR 477)
 - d. The relevant question is: "Is there a real danger of injustice having occurred as a result of bias". A real danger involves more than a minimal risk, less than a probability (*R v Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All ER 139; *Calor Gas Limited v Bray* [2005] UKEAT 0633).

EAT Decision

7. The EAT considered that there were at least three occasions when the EJ gave the appearance of having taken a side.

8. Firstly, the EAT considered that the EJ had demonstrated a closed mind by making the following comment before R's evidence had been presented:
9. *"The Claimant has mitigated her loss and you will not convince me that she acted unreasonably. In 25 years, I have never had someone argue this and I thought you were an experienced employment lawyer. If the Respondent had pleaded failure to mitigate, I would have issued a deposit order."*
10. Secondly, the EAT considered that the judge's remark about the employment lawyer contained in the same comment was pejorative and served to heighten the impression that the judge had a closed mind. R's witness suggested that the EJ had gone further in his comments about R's lawyer but the EAT considered it unnecessary to make a finding of fact as it considered the risk of bias already demonstrated in this regard.
11. Thirdly, the EJ's suggestion to R's witness that the witness might be in contempt of court went beyond legitimate enquiry. The EJ's statement to the EAT explained that the EJ was concerned that the witness might not have disclosed original meeting notes but the EAT considered that the EJ's observation to the witness would cause the informed and impartial observer to consider there was a real risk of bias.

Outcome and conclusions

12. Most of the objections raised by R were ultimately rejected by the EAT but it was acknowledged that where there are examples of behaviour that crosses the line and indicates a closed mind it's not surprising that "every intervention is then viewed with suspicion, even if only in hindsight".
13. The appeal was allowed, and the EAT set aside the ET's judgment and directed the matter to be remitted for re-hearing afresh, before a differently constituted ET.

1 May 2023

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