Appeal No. UKEAT/0100/19/JOJ
UKEAT/0181/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 7 October 2020
Judgment handed down on 28 October 2020

Before

THE HONOURABLE LORD FAIRLEY

(SITTING ALONE)

UKEAT/0100/19/JOJ

DR VIVIENE LYFAR-CISSÉ APPELLANT

1) BRIGHTON AND SUSSEX UNIVERSITY HOSPITALS NHS TRUST
2) MR ANTHONY KILDARE

RESPONDENTS

UKEAT/0181/19/JOJ

DR VIVIENE LYFAR-CISSÉ APPELLANT

1) BRIGHTON AND SUSSEX UNIVERSITY HOSPITALS NHS TRUST
2) WESTERN SUSSEX HOSPITALS NHS FOUNDATION TRUST
3) Ms EVELYN BARKER
4) Ms MARIANNE GRIFFITHS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MS ALTHEA BROWN (of Counsel) Instructed by: Consila Legal, 4 Park Place, Leeds, LS1 2RU.
For the Respondents	MR THOMAS KIBLING (of Counsel) Instructed by: Cater Leydon Millard, 68 Milton Park, Abingdon, OX14 4RX.

SUMMARY

PRACTICE AND PROCEDURE – Bias and procedural fairness; waiver

Did the fact that the same lay member sat concurrently on two separate tribunal panels considering claims which involved the same parties give rise to apparent bias and thus unfairness? If so, had the Appellant waived the right to take the point?

JURISDICTIONAL POINTS –Time bar; pleading; conduct extending over a period

Where the Appellant (a) indicated during pre-hearing case management that no issue in her case arose after 10 August 2016, and (b) thereafter stated at the start of the full hearing that she relied upon the discretion of the tribunal to extend the primary time limit under section 123 of the **Equality Act 2010** on just and equitable grounds, did the tribunal err in rejecting an argument advanced in closing submissions that she was entitled to rely upon an event after 10 August 2016 on the basis that it was linked to earlier events as part of a course of "conduct extending over a period" in terms of section 123(3)(a) of that **Act**?

Held:

(1) In the particular circumstances of the two cases, a fair minded and informed observer would not see a real possibility of bias, nor was there actual unfairness to the Appellant in the conduct of either case.

(2) Conduct which was not relied upon as being discriminatory could not be founded upon as part of a course of conduct extending over a period in terms of section 123(3)(a) of the **Equality Act 2010**. In any event, it would not have been fair to have allowed the Appellant to

raise that point only in closing submissions, and the tribunal did not err in holding that it did not have jurisdiction to determine her claims.

A **THE HONOURABLE LORD FAIRLEY**

Introduction

B 1. These two appeals were heard together on 7 October 2020. Due to Covid restrictions, the hearing was conducted by video conference. The first appeal is from a Judgment and Reasons dated 14 January 2019 of an Employment Tribunal at London South chaired by Employment Judge (EJ) Bryant QC. I will refer to that case, as parties did in their submissions, as "the Bryant Tribunal". The second appeal is from a Judgment and Reasons dated 12 March 2019 of an Employment Tribunal also at London South chaired by EJ Baron. I will refer to that case, again as parties did, as "the Baron Tribunal".

D 2. The Appellant is a clinical biochemist. She was employed by Brighton and Sussex University Hospitals NHS Trust ("BSUH") from 1985 until her dismissal, with notice, in June 2017. The effective date of termination of her employment was 27 September 2017. At the date of her dismissal, the Appellant's job title was Associate Director of Transformation. In that role, she had a significant responsibility for equality issues. In February 2017 the Appellant presented a claim form (ET1) to the Employment Tribunal in which she alleged direct discrimination on the ground of race and victimisation. Those claims were ultimately the subject of the Bryant Tribunal. Following her dismissal, the Appellant presented a further ET1 in July 2017 alleging unfair dismissal (section 94 and 103A **ERA**), discrimination on the ground of race, victimisation contrary to section 27 of the **Equality Act 2010** and victimisation contrary to section 47B **ERA**. Those claims were ultimately the subject of the Baron Tribunal.

3. Evidence and submissions were heard in the Baron Tribunal over six days on 19 to 21 September and 25 to 27 September 2018. The Baron Tribunal members then met in late November 2018 to deliberate. They did so over three days on 26, 29 and 30 November 2018.

Their deliberations did not conclude on 30 November and were continued to a date in early January 2019. The Judgment in the Baron Tribunal is dated 12 March 2019 and was sent to parties on 13 March 2019.

4. Meanwhile, following a reading day for the tribunal on 10 December 2018, evidence and submissions in the Bryant Tribunal were heard over seven days on 11-14 and 17-19 December 2018. The Bryant Tribunal members deliberated on 20 and 21 December 2018. The Judgment in the Bryant Tribunal was dated 4 January 2019 and was sent to parties on 14 January 2019.

The Judgments of the Tribunals and the issues in these appeals

5. The Bryant Tribunal concluded that it did not have jurisdiction to hear the Appellant's claims of discrimination and victimisation because they were time-barred. It accordingly dismissed them. The Baron Tribunal held that the dismissal of the appellant was fair, and that she had not been discriminated against or victimised. It also dismissed all of her claims.

6. In these appeals, the Appellant submits that the Judgments of the Bryant Tribunal and the Baron Tribunal were each tainted by bias because a lay member – Ms Campbell – sat as a member of both panels. The Appellant submits that the involvement of Ms Campbell in both cases resulted in procedural impropriety and denial of a fair hearing. The Appellant also submits that, in any event, the Bryant Tribunal erred in law in deciding that her claims of discrimination and victimisation were presented beyond the primary time limit. The Respondents submit that no issue of bias arose from the involvement of Ms Campbell on both panels but that, even if it did, any right to object on that ground was expressly waived by the Claimant. They further submit that, having regard to the way in which the Appellant pled her case before the Bryant Tribunal, the Tribunal was correct to hold that her claims were time-

barred. To consider these issues, it is necessary to examine in some detail the procedural history of both sets of claims and the decisions that each tribunal took.

The Bryant Tribunal

7. As originally framed, the ET1 in the Bryant Tribunal named three respondents, *viz* (i) BSUH; (ii) a Ms Cashman; and (iii) a Mr Kildare. By letter dated 15 March 2017 to the Tribunal, the Appellant applied to add two further respondents, a Mr Ward and a Dr Smith. By letter to the Tribunal dated 19 August 2017, however, the Appellant intimated that she had decided not to continue with her claim against Ms Cashman as a separate respondent and had also decided not to seek to introduce Mr Ward and Dr Smith as respondents. This left BSUH and Mr Kildare as the only respondents named in the Bryant Tribunal.

8. Before examining how the scope of these claims was further clarified during case management up to the date of the Bryant Tribunal hearing it is useful, at this point, to consider briefly what involvement Ms Cashman, Mr Kildare, Mr Ward and Dr Smith had each had with the Appellant.

9. As well as her substantive role as Associate Director of Transformation with BSUH, the Appellant was also chair of the local and national NHS BME networks. A number of related grievances were raised during 2014 and 2015 by and against the Appellant and by others within the BME network group against the Appellant's accuser, a Ms Burns. Ultimately, there were nine linked grievances. BSUH sought the assistance of independent Senior Counsel, Henrietta Hill QC, to investigate and report on all of these grievances. Ms Hill reported on 7 August 2015. She found *inter alia* that in respect of certain of the complaints made against the Appellant by Ms Burns, there was a case to answer. The Appellant was unhappy with the conclusions of Ms Hill's report and submitted an appeal against it in terms of BSUH's Dignity

at Work Policy. After sundry procedure, that appeal against commenced on 20 April 2016 before BSUH's then Chairman, Mr Julian Lee. Mr Ward's involvement was to present the management case in the appeal. The appeal process did not conclude in April. On 17 May 2015, Mr Lee resigned. He was replaced by Mr Kildare who thereafter took over responsibility for hearing the appeal against Ms Hill's report. The appeal hearing resumed on 22 June 2016. By letter dated 11 July 2016, Mr Kildare rejected the appeal and recommended that the issues in respect of which Ms Hill had identified a case to answer by the Appellant be taken forward in a disciplinary process.

10. Meanwhile, on 6 May 2016, the Appellant had been excluded from work as a result of an allegation that she had verbally abused Mr Ward during a chance encounter with him on 5 May 2016. It was claimed that she had made a racist remark to Mr Ward by stating "*you are everything that I despise in a white senior manager*." The decision of 6 May to exclude the Appellant from work was made by Dr Smith. The alleged incident involving Mr Ward was thereafter the subject of an independent investigation by an external solicitor with extensive experience in employment law, Mr Alemoru. Mr Alemoru reported to Dr Smith on 15 July 2016. Mr Alemoru's conclusion was that there was a case for the Appellant to answer.

11. On 29 July 2016, Dr Smith decided that the matters concerning the Appellant in respect of which Ms Hill and Mr Alemoru had each reported should be progressed to a disciplinary hearing. Ms Cashman was appointed to chair that hearing. She wrote to the Appellant on 10 August 2016 inviting the Appellant to attend. The hearing took place on two dates in September 2016. By letter dated 11 November 2016, Ms Cashman issued her decision. Ms Cashman did not uphold a number of the allegations against the Appellant. She did, however, uphold four allegations related to the Hill report. These included allegations that the Appellant had bullied and harassed Ms Burns. Ms Cashman also upheld a fifth allegation concerning the

incident on 5 May 2016 involving Mr Ward. In relation to that latter incident, Ms Cashman found that the Appellant had discriminated against Mr Ward and had acted in a way that amounted to harassment related to his race. Ms Cashman's decision was to issue a final written warning to the Appellant.

12. Returning to the issue of how the Appellant's claims developed in the course of case management prior between August 2017 and the Bryant Tribunal hearing, at a Preliminary Hearing on 25 September 2017 the Appellant formally withdrew her claim against Ms Cashman. On 25 September 2017, case management directions were issued in relation to the cases against the two remaining Respondents, BSUH and Mr Kildare, and the case was listed for a full hearing in December 2018.

13. By November 2018, however, there were still outstanding case management issues. A further Preliminary Hearing was held by telephone before Employment Judge Martin at the London South Tribunal on 30 November 2018. The Appellant wished to add new comparators, but that application was refused. In the course of the Preliminary Hearing, the scope of the Appellant's case was discussed. In her Note of the Hearing, EJ Martin noted:

> **"During the discussion, the Claimant clarified that the issues in her claim stop at 10 August 2018 (*sic*) when the Claimant received a letter from the disciplinary chair saying she would face a full disciplinary hearing."**

The reference in EJ Martin's Note to "August 2018" was clearly, *per incuriam,* a reference to August 2016.

14. The first day of the Bryant Tribunal was 10 December 2018. That day was assigned as a tribunal reading day. On 11 December both parties attended. The Appellant represented herself. The Respondents were represented by counsel. EJ Bryant noted that once all parties were present, the Tribunal "informed them that one of the lay members had been part of the

tribunal panel which had heard the Dismissal Claim over a number of days in September 2018 and in respect of which that tribunal had reserved, but not yet promulgated, its judgment". He also noted that "[n]o issue was raised by any party in respect of that lay member also sitting on this case" (Bryant Tribunal Reasons, para. 11). The reference to "the Dismissal Claim" was to the Baron Tribunal. During this appeal, there was some dispute about precisely what was said by EJ Bryant at that point in proceedings on 11 December. Prior to the hearing before me, that issue had been the subject of a **Burns / Barke** procedure (see further below). It was common ground in these appeals, however, that the Appellant did not object at that stage to Ms Campbell's involvement as a member of the Bryant Tribunal.

15. Having noted the absence of an agreed list of issues, EJ Bryant then sought clarification of the live issues which were before the Bryant Tribunal. He recorded (Bryant Tribunal Reasons, para. 17)

> **"The Claimant confirmed that she relied upon the following as substantive parts of her case, each being said to amount to direct race discrimination and / or victimisation:**
>
> **17.1 Mr Kildare's refusal, on 11 July 2016, of her appeal against the Hill Report;**
>
> **17.2 Dr Smith's decision to exclude her from work on 6 May 2016;**
>
> **17.3 Dr Smith's decision to progress matters to a disciplinary hearing, the date of which was later clarified as being 29 July 2016."**

16. The Appellant also intimated to the Tribunal that she wished to rely upon a fourth matter, namely the disciplinary decision by Ms Cashman on 11 November 2016 to give her a final written warning. The Respondent objected to her doing so, submitting that any such claim had been expressly withdrawn during pre-hearing case management.

17. EJ Bryant records at paras. 21-24 of the Bryant Tribunal Reasons how that issue was dealt with:

> **"21. Having heard from parties on this disputed issue the tribunal found that Ms Cashman's disciplinary decision was not a live substantive part of this case. It was clear that Ms Cashman's decision had at one time been a live part of the case. The Claimant had withdrawn her claim against Ms Cashman as a separate Respondent in September 2017 but that of itself would not necessarily answer the question; the Claimant could still pursue a claim against the First Respondent based on the actions of Ms Cashman. However, it is clear from the record of the telephone PH on 30 November 2018 and from the Employment Judge's notes of that PH that the Claimant confirmed in clear terms that she did not rely on anything as a substantive part of her case that post-dated 10 August 2016. The tribunal is aware that the Claimant is acting in person but she has considerable experience of tribunal litigation and the process of identifying and clarifying the claims that are relied upon. The tribunal has concluded that there was at the November 2018 PH a clear and express withdrawal of any remaining claim concerning matters that post-dated 10 August 2016, including Ms Cashman's disciplinary decision. The tribunal notes that this is also consistent with the Claimant's own witness statement, dated 3 December 2018, which confirms (at paragraph 314) that she intended to rely on matters other than the three specific live issues identified above '*as background information only*'.**
>
> **22. The tribunal informed parties of its conclusion that there was no live substantive issue in this case concerning Ms Cashman's disciplinary decision or anything else that took place after 10 August 2016, and its reasons for that conclusion as outlined above. It also informed parties that a substantive claim concerning Ms Cashman's disciplinary decision could only be pursued if there were an amendment to the case. The tribunal discussed with the Claimant the question of jurisdiction in that all of the substantive claims now pursued appeared to be out of time but a claim concerning Ms Cashman's decision would, if pursued, appear to be in time.**
>
> **23. The Claimant then asked for a break until 2pm (it being 12.30 by this time) to consider her position. The tribunal gave the Claimant the time she had requested.**
>
> **24. On the resumption of the hearing, shortly after 2pm, the Claimant said that she had decided not to seek an amendment to her claim and that she would argue in due course that it would be just and equitable to extend time to allow her existing claims to be heard. The tribunal checked with the Claimant that this was the position she wished to adopt and that she understood the implications, in terms of jurisdiction, of not applying to amend her claim to add back in her allegations concerning Ms Cashman's actions and she confirmed that it was."**

18. After resolving all other preliminary matters, the Bryant Tribunal then proceeded to hear evidence and, in due course, submissions on the issues which had been identified. With the exception of the Appellant, none of the witnesses who gave evidence at the Bryant Tribunal had given evidence at the Baron Tribunal.

19. Part of the bundle of documents before the Bryant Tribunal was a Judgment and Reasons in another tribunal case brought by the Appellant ("the Hill Claim") which had been heard during May and June 2017 and which had dealt specifically with issues arising out of the Henrietta Hill QC investigation and report (Bryant Tribunal Reasons at para 31). On the morning of the fourth day of the Bryant Tribunal hearing, the Appellant handed a letter to the clerk. The letter was addressed to EJ Bryant. In the letter, the Appellant expressed concerns about certain questions that she had been asked by Ms Campbell (who was erroneously identified in the letter as Ms Batchelor) on the third day of the hearing whilst the Appellant was giving her evidence. It had been put to the Appellant in cross examination by the Respondents' counsel that her allegations of discrimination and victimisation against Ms Hill had serious consequences for Ms Hill including preventing her from undertaking judicial work whilst they remained outstanding. The first matter with which the Appellant took issue was a question from Ms Campbell - apparently picking up the line explored in cross-examination – about whether the Appellant appreciated the seriousness of an allegation of discrimination / victimisation against someone in Ms Hill's position. The second matter related to a suggestion – the origin of which was a finding in fact made in the Hill Claim – that the Appellant had refused to participate in Ms Hill's investigation. The concerns expressed by the Appellant in her letter to EJ Bryant related only to those two matters. No issue was raised either about Ms Campbell's membership of the Baron Tribunal in general or, more specifically, about any potential for cross-contamination of evidence between the Baron Tribunal and the Bryant Tribunal. EJ Bryant reassured the Appellant that the Bryant Tribunal would not seek to "go behind" findings in fact made by the tribunal which heard the Hill Claim. The Appellant was then asked by EJ Bryant whether she wished to make any application related to the content of her letter, and she replied that she did not (Bryant Tribunal Reasons at paras. 35-37).

20. After the evidence had been concluded, and in the course of her closing submissions to the Bryant Tribunal on the issue of jurisdiction, the Appellant submitted that there was a link between the three allegedly discriminatory acts on which she founded (being those identified at para. 17 of the Bryant Tribunal Reasons) and the disciplinary decision of Ms Cashman in November 2016. Her reason for so doing was to seek to advance an argument that the discrimination which she claimed had occurred was "conduct extending over a period" in terms of section 123(3)(a) of the **Equality Act 2010** and was accordingly within the primary time limit. By that means, she sought to submit that that she did not, in fact, require to invoke the just and equitable discretion to extend the time limit to allow the three particular claims involving Mr Kildare and Dr Smith to be considered on their merits. Understandably, given the history of the case and the point in the proceedings at which that submission was made, the Respondents took issue with it. At para. 115, the Tribunal rejected the argument that the Appellant could rely upon the Cashman decision for the purposes of section 123(3)(a), stating:

> **"The difficulty with that argument is that it has already been decided that there is no substantive live issue in this case concerning Ms Cashman's decision and there has been no application to amend the claim to add such an issue back in."**

The Tribunal again noted (at para. 113) that these issues had been discussed on 11 December 2018, at which point the Appellant had acknowledged that the absence of the Cashman decision as a live issue meant that all of her claims were out of time and that she would need an extension of time if the tribunal was to have jurisdiction to hear them.

21. The Tribunal thereafter concluded that all of the three allegedly discriminatory acts which had been identified as live issues in the case fell outside the primary limitation period. In respect of the decision by Mr Kildare on 11 July 2016, the ET1 was presented 4 months out of time. In respect of the later of the two decisions of Dr Smith founded upon, the primary

limitation period expired 3 ½ months before the ET1 was presented. The Tribunal considered whether or not it would be just and equitable to extend the primary time limit but declined to do so. On that issue, it rejected the only argument made by the Appellant, which was that it would be just and equitable to extend the time limit because if she had not withdrawn her claims against Ms Cashman, she would then have been able to submit that the remaining three claims were in time. The Tribunal also considered whether there was any other reason – even though not advanced by the Appellant – to extend the time limit but concluded that there was not. It noted, in particular, that the Appellant had not been unwell or otherwise impeded in the period which preceded and the lodging of the ET1, and that she had knowledge of the time limits applicable to discrimination claims as a result of previous a previous case on time bar that she had pursued as far as the Court of Appeal.

22. At para. 123, the Tribunal accordingly concluded that it had no jurisdiction to hear the Appellant's claims. It then, however, went on to consider what decisions it would have reached on the merits of the discrimination / victimisation claims had it not declined jurisdiction on the basis of time bar.

Burns / Barke procedure

23. As noted above, there was a factual dispute during the present appeals about precisely what was said by EJ Bryant at the start of the hearing on 11 December 2018. The Appellant has produced an Affidavit which states that EJ Bryant stated that it was not uncommon or unusual for a wing member to be involved in more than one case involving the same parties and that he did not expect parties to object. An Affidavit in the same terms has been produced by the Appellant's sister, Sonia Lyfar, who was also present on 11 December. The Respondents have produced a Witness Statement from instructing solicitor, Lisa Harris. The Statement bears to be based upon a contemporaneous note taken by Ms Harris on 11 December at the hearing. She

A has recorded EJ Bryant as saying: "One of my lay members sat on a previous case involving the parties. I can't see that it makes any difference to anything."

B 24. In response to **Burns / Barke** procedure questions, EJ Bryant has produced a note dated 9 December 2019. He confirms that he remembers raising with the parties on 11 December 2018 the fact that Ms Campbell had recently heard evidence another case by the Appellant against BSUH where the decision had not yet been promulgated. His note continues:

C

> **"I do not recall the precise words that I used, but I did not say that it was not uncommon or unusual for a wing or lay member to be involved in more than one case involving the same parties; such an occurrence is unusual in my experience.**
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> **I also did not say, and would never say to a party, that I did not expect either party to object to Ms Campbell sitting on this case, but I did say something to the effect that the tribunal had itself considered whether this was a problem but had concluded that it was not.**
>
> **I then gave both parties the opportunity to say whether they considered it to be a problem or to say anything else they wished to. Neither party raised any issue about Ms Campbell sitting on this case either then or at any later stage of the hearing."**

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25. Ms Campbell also provided a response and advised that her notes from 11 December "record that EJ Bryant QC did express a view that he could see no reason why I (Ms Campbell) should not hear this case." Ms Campbell's notes also record both parties being asked if they had any objection to Ms Campbell continuing to be a member of the Bryant Tribunal and to there being "no objection from Mr Kibling or Dr Lyfar-Cissé (and her sister)". The other lay member, Ms Batchelor, states that she did not record exactly what was said, and that her notes record simply: "Mrs Campbell sat on the earlier case with these parties. Ms Batchelor states: "It is my recollection that neither party objected."

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The Baron Tribunal

26. The claims made by the Appellant in the case which was heard by the Baron Tribunal were (a) a claim of "ordinary" (section 94, **Employment Rights Act 1996** ("ERA")) unfair dismissal; (b) a claim of automatic (section 103A **ERA**) unfair dismissal on the basis that the reason for her dismissal was that she had made protected disclosures; (c) various claims of victimisation and discrimination under the **Equality Act 2010**; and (d) various claims of victimisation in terms of section 47B **ERA**. As already noted above, with the single exception of the Appellant, no other witness gave evidence before both the Baron Tribunal and the Bryant Tribunal.

27. Of twelve allegedly protected acts relied upon by the Appellant in the Baron Tribunal, five related to the bringing of Tribunal other proceedings by the Appellant against BSUH. One of those allegedly protected acts was the bringing of the claims which were ultimately heard by the Bryant Tribunal in December 2018. Another related to the Hill Claim which was heard in May and June 2017.

28. The manager who took the decision to dismiss the Appellant was BSUH's Chief Executive Officer, Mrs Marion Griffiths. She gave evidence to the Baron Tribunal about that decision.

29. By way of background to the decision to dismiss, during 2016 the Care Quality Commission ("CQC") had carried out an inspection of BSUH. CQC identified a number of serious inadequacies in leadership, citing *inter alia* a "culture of bullying and harassment". As a direct result of those failings BSUH was placed in "special measures" by a body known as NHS Improvement. As has already been noted above, Ms Cashman issued her decision in the disciplinary case against the Appellant in November 2016.

30. On 26 May 2017, Mrs Griffiths wrote to the Appellant to invite her to a meeting the purpose of which was stated as being:

> **"…to formally consider if your employment as Associate Director of Transformation should be terminated because…**
>
> **…I believe that the quality of leadership is crucial and I need to have trust and confidence in senior people in [BSUH] as we tackle the significant challenges outlined by the CQC. I have concerns that it may not be tenable for you to have been found to have committed acts of victimisation, discrimination and harassment and still be responsible for leading BSUH in relation to race equality as your conduct is fundamentally incompatible with that…"**

Evidence of the contents and conclusions of Ms Cashman's investigation was led before the Baron Tribunal because of its relevance to the decision of Mrs Griffiths to invite the Appellant to that meeting and, ultimately, to her subsequent decision to dismiss the Appellant. Paragraphs 33-39 of the Baron Tribunal's Reasons accordingly set out in some detail the various allegations against the Appellant which had formed the basis of the disciplinary process presided over by Ms Cashman and the outcome of that process.

31. The meeting between the Appellant and Mrs Griffiths took place on 14 June 2017. At the meeting, Mrs Griffiths perceived the Appellant to be defiant and combative, noted that she sought to criticise everybody else, and formed the view that she did not take responsibility for her position (Baron Tribunal Reasons at para. 93). The Appellant was notified of outcome of the meeting in a lengthy letter from Mrs Griffiths dated 28 June 2017. In short, Mrs Griffiths decided to terminate the Appellant's employment on three months' notice. She also invited the Appellant to meet with BSUH to discuss re-deployment. An appeal against the dismissal decision was heard on 3 August 2017 by a panel chaired by BSUH Chairman, Michael Viggers. The decision of Mr Viggers was to uphold the decision of Mrs Griffiths.

32. The Baron Tribunal accepted as credible and reliable the evidence of Mrs Griffiths that the principal reason for her decision to dismiss the Appellant was her view that it was not appropriate for someone who had been found responsible for acts of victimisation, harassment and discrimination to be the lead person in BSUH with responsibility for race equality. An important factor in that conclusion was the CQC's findings, and the remedial steps that were necessary to address those findings (Baron Tribunal's Reasons at paras. 97, 126 and 126). At para.138, the Baron Tribunal stated:

> **"What Mrs Griffiths was faced with was a NHS Trust in special measures in respect of which the CQC had made an adverse finding that harassment and discrimination was rife. One of the individuals who had been found responsible of (sic) unlawful discrimination was [the Appellant]. It was she who held the very senior position of Associate Director of Transformation. As Mrs Griffiths put it in her witness statement, 'hers was a leadership role related to race equality and it was not objectively credible or acceptable for her to lead on the important issue of race equality, which…has respect at its heart, having been found to have acted in a way that was discriminatory and lacking respect for colleagues on more than one occasion.' "**

33. The Baron Tribunal found whilst that the reason for the dismissal could be classified either as "conduct" or as "some other substantial reason", on either view dismissal was within the range of reasonable responses:

> **"Our conclusion is based upon the combination of the factual findings which were made by Ms Cashman, the particular role held by [the Appellant], the criticisms in the CQC report and [the Appellant's] unwillingness to accept any responsibility at the meeting with Mrs Griffiths."** (para. 142)**.**

34. Having made a finding in fact about the reason for the dismissal, the Baron Tribunal noted that the corollary of that finding was that the finding of automatic unfair dismissal under section 103A failed. Finally, the Baron Tribunal concluded that none of the detriments relied upon by the Appellant were acts of discrimination or victimisation.

35. None of the detriments relied upon by the Appellant before the Baron Tribunal featured either Mr Kildare or Dr Smith. Whilst Mr Kildare was briefly mentioned in the evidence at the Baron Tribunal (Baron Tribunal Reasons at paras. 56 and 59), that was not in relation to any matter which featured as an issue before the Bryant Tribunal.

36. At para. 32 of the Baron Tribunal Reasons, Employment Judge Baron stated:

> **"Between 2004 and February 2017 the Claimant had presented five claims to the Tribunal against BSUH…I was aware that one or more of those claims had not been concluded at the time of this hearing [i.e September 2018], and I have ensured that both the lay members and I did not obtain any information about them save as mentioned in evidence."(emphasis added)**

37. It was submitted on behalf of the Appellant that whilst the highlighted passage may have been factually correct in September 2018 when the Baron Tribunal finished hearing evidence and also during its deliberations in November 2018, it cannot have been correct by the time of the Baron Tribunal's deliberations in January 2019 or when the Baron Tribunal Judgment and Reasons were issued in March 2019. By both of those later dates, Ms Campbell had heard the whole of the evidence which was led before the Bryant Tribunal and had participated in the whole of the Bryant Tribunal's deliberations.

Summary of submissions

Appellant

38. Counsel for the Appellant submitted that the cases heard respectively by the Baron Tribunal and the Bryant Tribunal were so closely connected as to give rise to a real possibility of bias where Ms Campbell had sat concurrently as a lay member on both panels. Under reference to the list of issues identified by the Baron Tribunal, she noted that one of the allegedly protected acts relied by the Appellant upon before the Baron Tribunal was the

bringing of the Bryant Tribunal (issue 10(v), noted at para. 8 of the Baron Tribunal Reasons). In addition, issue 13(vi) in the Baron Tribunal's list of issues identified as an alleged detriment founded upon by the Appellant: "*Setting aside and / or increasing the disciplinary of final written warning*". That was a reference to Mrs Griffiths' decision in June 2017 to rely upon the Cashman decision of 11 November 2016 as part of her reason for dismissing the Appellant. The information to which Ms Campbell became party due to her involvement in both cases *might* or *could* be seen to undermine both decision-making processes. The members of a tribunal panel should all be in an equal position to make a decision only on the basis of the evidence presented in the case before them. Information to which Ms Campbell became party in her position as a member of the Baron case should not form part of her knowledge as a member of the Bryant Tribunal and *vice versa*. Although neither EJ Bryant nor EJ Baron had been in a position to consider the full potential for prejudice, Ms Campbell was acutely aware of what she was being asked to adjudicate upon in each case. The onus was on her to raise the issue with EJ Bryant at the start of the Bryant hearing and to put the matter properly before him. There was then a duty on EJ Bryant properly to have interrogated the issue and to have spoken to EJ Baron. Counsel also relied heavily on the fact that the statement made by EJ Baron at para. 32 of the Baron Reasons was factually incorrect.

39. Counsel submitted that the Cashman decision of November 2016 was important as it had featured prominently in the evidence heard by the Baron Tribunal in September 2018 (Baron Tribunal Reasons, especially at paras. 33-39). In the Bryant Tribunal in December 2018, the Cashman decision was relevant to the Appellant's contention that she should be able to rely upon it as part of a discriminatory act extending over a period. The Bryant Tribunal had, however, taken a decision to exclude that evidence. As a member of the Bryant tribunal, Ms Campbell had accordingly adjudicated upon the issue of whether or not the Appellant was

allowed to rely upon the Cashman decision as an element of her claim whilst being fully aware of the details of the Cashman decision from the evidence that she had heard as a member of the Baron Tribunal. An overlap arose because both tribunals were adjudicating upon issues which either referenced or related to Ms Cashman's decision. Reference was also made to that fact that Mr Kildare had featured in the evidence before both tribunals. It was submitted that the Appellant's working relationship with him was a live issue before both the Baron and the Bryant Tribunal.

40. So far as the issue of waiver was concerned, Counsel submitted that this arose only in the Bryant Tribunal, as that was the only occasion when the Appellant had been given any chance to comment on Ms Campbell's dual role. It was of particular relevance that EJ Bryant had apparently expressed a view that had discouraged the Appellant from taking the matter further. It was always very difficult for any litigant to invite recusal. That difficulty was heightened in the case of a litigant in person. It was particularly acute in this case where the Respondents were represented by counsel, the case had been listed for ten days, there had already been delay in securing a hearing date, and the possibilities of finding an alternative lay member or proceeding with a panel of two were not canvassed with the Appellant by the Judge. What had happened had not been in accordance with the guidance in **Jones v DAS Legal Expenses Insurance Co. Limited** [2004] IRLR 218. Instead, the input from the Judge had been perfunctory and dismissive, and that had deprived the Appellant of the chance to make a fully informed decision about the issue.

41. Finally, in relation to the Bryant Tribunal's decision on time bar, Counsel submitted that the Tribunal had erred in failing to consider the Cashman decision of 11 November 2016. Had it done so, it could only have reached the conclusion – applying **Hale v Brighton & Sussex University Hospitals Trust** UKEAT/0342/16/LA and **Commissioner of Police of the**

Metropolis v Hendricks [2003] ICR 530 – that the discrimination of which the Appellant complained was conduct extending over a period, and thus that since the Cashman decision fell within the primary time limit, the whole of her claim had been brought in time.

Respondents

42. Counsel for the Respondents invited me to refuse both appeals. On the issue of bias, he submitted that there was no overlap of factual or legal issues between the two cases. The repeated assertion that the two cases were linked was, he submitted, misplaced, misleading, unhelpful and opportunistic. A fair minded and informed observer, having considered the relevant facts, would not conclude that there was any real possibility that either tribunal was biased (**Porter v Magill** [2002] AC 357 at para. 103, per Lord Hope of Craighead). In applying that "fair minded observer" test, an intense focus on the facts was necessary as the facts and context were always critical (**Locabail (UK) Limited v Bayfield Properties Limited** [2000] IRLR 96, at para. 25 per Lord Bingham of Cornhill; and **Resolution Chemicals Ltd v H Lundbeck AS** [2014] 1 WLR 1942, at para. 35). The fair-minded observer was not complacent but was also not unduly sensitive or suspicious (**Resolution Chemicals** at para. 25). Even where a decision-maker had commented adversely on a party or a witness in a previous case that would not, without more, found a sustainable objection (**Locabail** at para. 25). It was implicit in what was said in **Locabail** that there is no general rule that a member of a tribunal who has previously sat on a panel hearing a case involving either or both of the parties must necessarily recuse themselves (see also **Lodwick v Southwark LBC** [2004] ICR 884). When the issues in the present two cases were carefully examined, there was no basis upon which a fair minded and informed observer could conclude that Ms Campbell's involvement as a panel member on both panels gave rise to any real possibility of bias through her knowledge of the evidence in one case tainting her involvement as a decision-maker in the other.

43. In any event, the Appellant had been clearly advised of Ms Campbell's dual role on 11 December 2018 and had unequivocally waived any right to object. At that stage, the Appellant was better placed than any other participant in the proceedings to know what her claims were and what the evidence was in each case. On 11 December 2018, the Appellant had all the information that she needed to make a fully informed decision on the matter (*cf* **Jones v DAS** at para. 36). The waiver had been freely given.

44. On the issue of time bar, Counsel submitted that the Tribunal had clearly been correct to conclude that the particular acts of Mr Kildare and Dr Smith relied upon by the Appellant, whether treated as individual acts or as a single act which continued over a period, all fell outside the primary time limit in section 123 of the **Equality Act 2010**. **South Western Ambulance Service NHS Foundation v King** [2020] IRLR 168, which was decided after **Hale**, established that conduct which is not itself discriminatory cannot be relied upon as "conduct extending over a period" for the purposes of section 123 of the **Equality Act 2010**.

Analysis

Bias

45. Although the Appellant refers at times in her Grounds of Appeal and in her skeleton argument to *actual* as well as *apparent* bias, no argument of actual bias was advanced before me in oral argument. Given the seriousness of an allegation of actual bias, I feel that it is important to record that I saw no basis whatsoever in the facts and circumstances of these two cases for any suggestion that actual partiality, prejudice or personal interest existed on the part of Ms Campbell or any other member of either tribunal. Properly analysed, the Appellant's argument was one based upon apparent bias as described by the Court of Appeal in **Locabail** at para. 16 and subsequently refined by the House of Lords in **Porter v Magill**, particularly in the

speech of Lord Hope at para. 103. The test for apparent bias involves consideration of whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

46. As was noted in both **Locabail** and **Resolution Chemicals**, application of the "fair minded observer" test requires a close examination of the facts and context of the particular case(s) in which bias is said to have arisen. The test is the same whether the objection on the ground of bias is made before or after trial. A sensible and pragmatic trial judge faced with an allegation of apparent bias at the start of a trial and following the guidance in **Jones v DAS** might well apply a cautious approach and recuse in advance of the hearing on the basis that it is – as it was put in **Resolution Chemicals** - "better to be safe than sorry". An appellate court considering the matter after trial has the advantage of being able to consider the entirety of the process. The test which the appellate court must apply, however, is still as described in **Porter v Magill**.

47. Applying that test to the circumstances of these two cases, there was no basis upon which such a fair minded and informed observer could conclude that Ms Campbell's involvement as a panel member on both panels gave rise to any real possibility of bias through her knowledge of the evidence in one case tainting her involvement in the other. Much was made on behalf of the Appellant of the significance of the Cashman decision of 11 November 2016 and of the suggested "overlap" which it created between the two cases. Forcefully as those submissions were presented, however, a careful examination of the role which the Cashman decision actually played in each case shows that they are not correct.

48. The decision taken by the Bryant Tribunal on 11 December 2018 was that evidence about Ms Cashman's disciplinary decision of 11 November 2016 was not admissible in the case before it. The basis for that decision was that in the course of pre-hearing case management,

and particularly at the Preliminary Hearing before EJ Martin on 30 November, the Appellant had expressly stated that "the issues in her claim" stopped at 10 August 2016. A fair minded and informed observer with knowledge of the issue which the Bryant Tribunal had to determine and also of the evidence which Ms Campbell had heard about the Cashman decision during the Baron Tribunal hearing would not have seen a real possibility of bias. Rather, the fair minded and informed observer would have concluded that all that the Bryant Tribunal was doing was determining what issues were properly before it, based on what had been said during pre-hearing case management. Nothing that Ms Campbell had previously learned about the substance of the Cashman decision could conceivably have affected her decision on that issue in her role as a member of the Bryant Tribunal panel. There was likewise nothing in the limited discussion of the Cashman decision during the Bryant Tribunal that would cause the fair minded and informed observer to consider that there was any real possibility of bias in Ms Campbell's consideration of the evidence about the Cashman decision that was led before the Baron Tribunal.

49. Although the primary focus of the Appellant's argument on apparent bias related to the Cashman decision, both in the Appellant's skeleton argument and also – albeit briefly – in oral submissions, reliance was also placed upon the involvement of Mr Kildare. He was a named Respondent in the Bryant Tribunal. As has been noted, the decision which the Bryant Tribunal ultimately took was that it had no jurisdiction to determine the claim involving Mr Kildare because it was time-barred, and no reason had been shown in justice and equity to extend the time limit. The substantive issue which, but for the time bar point, would have been before the Bryant Tribunal related to the decision of Mr Kildare, on 11 July 2016, to refuse the Appellant's internal appeal about the Henrietta Hill QC report. Although Mr Kildare was briefly mentioned in the evidence before the Baron Tribunal (at paras. 56 and 59), that was not

in connection with his role in refusing the internal appeal about the Henrietta Hill QC report. Further, Mr Kildare played no part in the decision to dismiss the Appellant, nor was he involved in any of the eight matters alleged by the Appellant to constitute the detriments on which her claims of victimisation in the Baron Tribunal were based. The Appellant nevertheless submits that "the nature of the Appellant's relationship with Mr Kildare was very much a live issue as can be seen in the respective Tribunal judgments" (Skeleton Argument for the Appellant at para. 30). I disagree. Nothing said or done by Mr Kildare was material to any live issue that was before the Baron Tribunal. To the extent that Mr Kildare featured at all in the evidence before the Baron Tribunal, that was not in relation to the same factual or legal matters as were before the Bryant Tribunal. A fair-minded and informed observer would not have seen any possibility of bias arising from Ms Campbell's involvement on both panels as a result of any of the evidence involving Mr Kildare.

50. The Appellant also placed considerable emphasis on para. 32 of the Baron Tribunal Reasons which, it was submitted, contained a factual inaccuracy. I agree that the use of the words "I have ensured" within that paragraph was misleading to the extent that it suggested that EJ Baron had succeeded in his stated objective of maintaining ignorance on the part of his tribunal members of any of the evidence or issues in the other claims, save as mentioned in the evidence before the Baron Tribunal. By December 2018, that objective had not been realised. By that time, Ms Campbell was fully aware of the facts and issues in the Bryant Tribunal, having participated as a member of the Bryant Tribunal panel. Whatever EJ Baron may have thought about the need for his stated objective as a precaution, however, the question for me is still whether or not a fair minded and informed observer, viewing the proceedings as a whole, would think that there was a real possibility of bias due to the involvement of Ms Campbell in both cases. For the reasons I have already noted above, the Appellant has failed to show any

A overlap between the two cases on any material issue of fact or law which would cause such a fair minded and informed observer to consider that there was such a possibility in either case.

51. For all of these reasons, the argument of apparent bias fails in both appeals.

B

52. The Appellant also refers in her skeleton argument to issues of procedural fairness and to Article 6 of the European Convention on Human Rights. Clearly, there can be a link between the concepts of apparent bias and fairness. The right to a fair trial, both at common C law and in terms of Article 6 of the Convention, includes the right to a trial and decision conducted and made by a decision-maker free from bias. The tests of fairness and apparent bias are nevertheless distinct and require the conduct of the trial to be assessed from slightly D different perspectives, although – as here – the factual analysis may largely be applicable to both. Whilst the assessment of apparent bias requires consideration of the trial from the perspective of a fair-minded and informed observer, the assessment of fairness is a subjective one which looks at the question of whether or not there was actual unfairness in the way the E trial was conducted.

53. In these appeals, however, issues of fairness seem to be relied upon only as developments of the primary argument on bias, rather than as stand-alone grounds. They were F not advanced as separate or stand-alone points in oral argument. For completeness, however, I saw no force in any suggestion of actual unfairness in either hearing. There was no actual unfairness either in Ms Campbell sitting as a lay member on both panels or in any other aspect G of the conduct of either hearing. Contrary to the submissions in the skeleton argument, the manner in which the Appellant's letter of 13 December 2018 to EJ Bryant was dealt with was entirely appropriate, and whilst (as noted above) the use of the words "I have ensured" in para. H 32 of the Baron Tribunal Reasons was misleading, that does not support an argument of either bias or unfairness when the proceedings are viewed as a whole.

Waiver

54. In light of my conclusions thus far, the question of waiver falls away. Had the point been material, however, I would have concluded that the Appellant did have sufficient information on 11 December 2018 to make a fully informed decision. The Appellant was at least as well placed as anyone else who was present on that day to know what issues arose in each of her two cases. On the question of whether waiver was "freely" given, whilst I would not have been able or inclined to resolve the issue of precisely what words were used by EJ Bryant, it is clear that the Judge did offer an opinion that he did not see Ms Campbell's involvement as a problem. Whilst acknowledging that such situations tend to be fact-specific, I would not have seen such an observation – even in the more robust terms suggested by the Appellant in her affidavit – as having interfered with her freedom of choice about whether or not to object. Finally, and for completeness, I saw no merit in the Appellant's argument that any waiver given by her in the Bryant Tribunal could not also have effect in the Baron Tribunal. Given the particular factual situation from which the allegation of apparent bias is now said to have arisen, a waiver validly given by the Appellant in relation to Ms Campbell's participation in the Bryant Tribunal would, in my view, also have constituted a waiver of any right to object to Ms Campbell's ongoing involvement in the Baron Tribunal.

55. In light of the conclusions that I have reached above on bias / fairness, however, the issue of waiver is not determinative of these appeals.

Conduct extending over a period

56. Within the Appellant's skeleton argument (at para. 64), it is submitted *inter alia* that the Bryant Tribunal "concluded that there was no act extending over a period in respect of the

disciplinary process". That is not an accurate representation of what the Bryant Tribunal actually decided. As has already been noted, the Bryant Tribunal concluded that there was no live issue before it in relation to the Cashman decision because of the way in which the Appellant had defined her claim during pre-hearing case management. The Tribunal nevertheless invited the Appellant to consider whether or not she wished to apply to amend to re-introduce the Cashman decision as a matter upon which she founded, but she expressly declined to do so (Bryant Reasons at paras. 22, 24 and 115). It is clear, however, that the Bryant Tribunal did consider the effect of section 123(3)(a) on the three specific matters that the Appellant ultimately chose to put in issue before it. In particular, at para. 114, it stated:

> **"In this case the last act of which substantive complaint is made was on 29 July 2016 and so even if earlier acts are taken to be part of an act extending over the period up to 29 July 2016, they would still all be out of time"**

57. The Appellant does not now challenge the Bryant Tribunal's decision not to extend the primary time limit on the grounds of justice and equity. As I understood the position advanced for the Appellant in this part of her appeal, it was that the Bryant Tribunal should have taken cognisance of the Cashman decision either as an actionable act of discrimination or, at the very least, as an adminicle of evidence which cast light on the earlier acts of Mr Kildare and Dr Smith.

58. The difficulty with the former position is that the Appellant clearly intimated at the Preliminary Hearing on 30 November 2018 that the issues in her claim did not extend beyond 10 August 2016. Further, she never sought to re-introduce any such issue by amendment prior to the evidence being concluded, in spite of being given ample opportunity to do so. To have acceded to her request to re-introduce a live issue about the Cashman decision as an alleged act

of discrimination only after all of the evidence had been led and at the stage of closing submissions would have been unfair to the Respondents.

59. The alternative position – of reliance upon the Cashman decision merely as "background" which might shed light upon the actions of Mr Kildare and Dr Smith – is more closely aligned to the position which was apparently taken by the Appellant in her closing submissions to the Bryant Tribunal, but does not advance matters for her in this appeal. As was noted in **South Western Ambulance Service NHS Foundation v King** [2020] IRLR 168, conduct which is not itself discriminatory cannot be relied upon as "conduct extending over a period" for the purposes of section 123(3)(a) of the **Equality Act 2010**. **King** related to the situation where acts occurring within the primary limitation period were said by the claimant to be discriminatory but were ultimately found by the tribunal not to be. The *ratio* of **King** applies with equal force, in my view, to acts within the primary limitation period which are not relied upon by the claimant as being allegedly discriminatory.

60. In any event, the question of fair notice is again relevant. Where time bar is a live issue in a case, notice requires to be given by the claimant of the alleged significance of any act falling within the primary limitation period which is said to engage section 123(3)(a). Such notice is necessary to give the respondent an opportunity to lead evidence in rebuttal of the suggestion that the conduct in question was part of a course of discriminatory conduct extending over a period. Such notice was not given in this case prior to the evidence being concluded. Rather, the position which was clearly stated by the Appellant on 11 December 2018 was that she accepted that she required to persuade the Bryant Tribunal to extend the time bar on just and equitable grounds.

61. In these circumstances, the Bryant Tribunal did not err in concluding (a) that the Appellant had failed to show "conduct extending over a period" any part of which fell within

the primary time limit (Bryant Tribunal's Reasons, paras. 114); and (b) that, in the absence of a discretionary extension of the primary time limit, it did not have jurisdiction.

Decision

62. For these reasons, both appeals are refused.