Neutral Citation Number: [2023] EAT 95

Case No: EA-2021-000845-VP

IN THE EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building,
Fetter Lane,
London,
EC4A 1NL

Date: 13 April 2023

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

ASPECT WINDOWS (WESTERN) LIMITED

Appellant

- and -

ADAM RETTER (AS REPRESENTATIVE OF THE ESTATE OF MRS C MCCRORIE) **Respondent**

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Rad Kohanzad of counsel (instructed by Croner Group Limited) for the **Appellant**
Adam Griffiths of counsel (instructed by Thompsons) for the **Respondent**

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JUDGMENT

SUMMARY

Practice and Procedure – Apparent Bias

Following the promulgation of the decision of the employment tribunal arising from a full merits hearing, one of the lay members of the tribunal posted on her LinkedIn page, a link to a report about the decision in the *Mail Online*. Followers of hers then responded on LinkedIn and she responded to them.

The unsuccessful Respondent in the employment tribunal appealed on the basis that the LinkedIn posts gave rise to apparent bias against it. Having regard to the particular content of the posts, and applying the guidance in **Magill v Porter** [2001] UKHL 67 and other pertinent authorities, the fair-minded and informed observer, having considered the contents of the post, would not in all the circumstances consider that the tribunal member was biased. The appeal was therefore dismissed.

HIS HONOUR JUDGE AUERBACH:

1. The respondent in the employment tribunal, which is now the appellant, makes and sells double glazing. The claimant in the tribunal, Mrs McCrorie, was employed by it as a sales support assistant. She was dismissed in June 2019 for the given reason of redundancy.

2. The claimant presented a claim to the employment tribunal. Her case was, in summary, that her purported redundancy was a sham. Her case was that she had, in truth, been dismissed because she had complained, and ultimately raised a grievance, about what the tribunal described as lewd and offensive comments in the office by her male colleagues. This included, on her account, sexual swearing and crude and offensive discussions and remarks with an explicitly sexual theme. Her complaints were of harassment related to sex, direct discrimination because of sex, victimisation and unfair dismissal.

3. The complaints were defended. The respondent's general case was principally that the claimant's account of the alleged incidents in the office was invented and not true; and that the redundancy was genuine.

4. The full merits hearing took place at Exeter by way of a hybrid hearing from 1 to 8 March 2021. The tribunal was Employment Judge Fowell, Mrs PJ Skillin and Ms R Hewitt-Gray. Both parties were represented. The tribunal gave an oral decision. Written reasons were requested and the written decision was promulgated on 22 March 2021.

5. The reasons run to more than 25 close-typed pages. The bulk of the decision is taken up with the tribunal's detailed findings of fact. For the purposes of this appeal, I do not need to descend to much detail, but I will give some flavour of the decision. The tribunal essentially accepted the claimant's factual account, in particular of the various incidents of which she had complained. Eventually she went off sick with stress. Her formal grievance followed. Following a meeting to discuss her grievance, there was a further meeting at which she was told that she was at risk of redundancy. Following further meetings, she

was dismissed. The grievance process, including an appeal against the initial outcome, continued and concluded following the dismissal.

6. For reasons which it explained, the tribunal was not satisfied that the reason for dismissal was redundancy. It found that the true reason was the complaints that the claimant had made, culminating in her grievance. All of her legal complaints succeeded. The decision went on to consider remedy. The tribunal described the profound effects which the treatment had had, and continued to have, on the claimant. The tribunal made an award of £30,000 for injury to feelings. Together with the award for financial loss, loss of statutory rights and interest, and after grossing up, the total final award was £86,496.81.

7. In the usual way, the tribunal's written decision was published on the internet in accordance with the principles of open justice. The ground of appeal that is before me relates to posts on LinkedIn which appeared following the publication of the tribunal's decision. They begin with a post by a member of the three-person tribunal panel, Ms Hewitt-Gray, on her LinkedIn page.

8. The page is headed **"Rachael Hewitt-Gray FCIPD MScHrd – Listening to the complex, to create Profitable Employment Solutions"**. Ms Hewitt-Gray's post reads: **"The case that I sat on as a Lay Member on Employment Tribunal is reported on Main on line today."** I interpose that "Main on line" was plainly a typo, the reference being to the *Daily Mail*'s online edition. That is clear, as immediately under the post was a link to a story about the case on dailymail.co.uk. The link has embedded within it what appears to be the image of a headline: "Office secretary wins £86,496 damages after 'campaign of harassment' ", together with some photographs that are also plainly from the *Mail Online* story. It was common ground before me that, one way or another, what Ms Hewitt-Gray will have done is posted the link to the particular web page carrying the story. The particular content of the text and images embedded in the link was not determined by her but, of course, would have been visible to her, as well as to others looking at her LinkedIn page.

9. Next, there is a post on LinkedIn by Denise Keating, Chief Executive at Umbrella HR, and then there is a response to that post from Ms Hewitt-Gray. Ms Keating's post also has the *Mail Online* link. It is not entirely clear from the materials I have, whether it appeared on Ms Hewitt-Gray's page or on Ms Keating's page; but nothing, in my view, turns on that. It is clear that Ms Keating was responding to the post made by Ms Hewitt-Gray, of the link to the *Daily Mail* online, and that Ms Hewitt-Gray then responded directly to Ms Keating's post.

10. Ms Keating's post reads: **"This is a brilliant outcome and I am delighted that Rachael Hewitt-Gray, a trusted associate working with Umbrella HR (outside of her Tribunal duties) played a vital role in this outcome."**

11. Ms Hewitt-Gray replied, in her post: **"Thank you Denise, As you know, I really enjoy sitting at Employment Tribunal and being part of the Judiciary. Hearing and deciding on cases is such an honour."**

12. There was also a response from Matt McDonald, a solicitor, to which Ms Hewitt-Gray replied; and then there is a further response from Claire Perry. Again, whosever page this thread appeared on, it is clear that Mr McDonald was reacting to Ms Hewitt-Gray's post relating to the *Mail Online* article, and these three posts are a single thread.

13. Mr McDonald wrote: **"Interesting case, Rachael. Thanks for sharing. A timely reminder for employers of the reputational as well as financial risks of fighting tribunal claims. Would I be right in thinking the 'it was just banter' argument got a good airing in this case?! My hearts sinks every time I hear that phrase!"**

14. Ms Hewitt-Gray replied: **"Thanks for engaging, Matt, interestingly, I didn't hear the popular phrase 'it was just banter', this time. But the respondent's defence was 'I didn't say that.'"**

15. Ms Perry posted one word: **"Brilliant"** or, possibly typed: **"Brilliant Rachael Hewitt-Gray FCIPD MScHrd."**

16. The respondent presented a notice of appeal containing two grounds. Ground one relies upon the LinkedIn posts and contends that these show apparent bias. Ground two was considered not arguable by the judge who considered the grounds of appeal on paper and was not further pursued. He directed ground one to proceed to a full appeal hearing, which came before me today.

17. The claimant in the tribunal, Mrs McCrorie, died in January 2023. It was subsequently directed that her son, Adam Retter, be appointed as the representative of her estate for the purposes of this appeal, so he is now the respondent to the appeal in that capacity.

18. As directed by the sift judge, an affidavit was tabled by Ms MacLeod, an HR manager with the respondent, who saw the LinkedIn posts, and to which she exhibited them. There was also an affidavit from Mrs McCrorie commenting in particular on the unwelcome press attention that she had received. But the ground of appeal does not relate to anything alleged to have happened at the tribunal hearing. Further, as I will discuss, the test of apparent bias does not turn on the subjective perception of either party. There is no dispute that the printed images that I have in my bundle, of the LinkedIn posts, are accurate and authentic. Beyond this, the affidavits do not assist me.

19. I note also that no comments have been sought, whether from Ms Hewitt-Gray, the employment judge, or the other lay member. But I note again that the challenge before me does not concern anything that occurred during the course of the employment tribunal hearing; and what Ms Hewitt-Gray subjectively thought or intended in making her posts is not relevant to the issue of apparent bias. It is important to stress also that there is no allegation in this case of actual bias, nor of so-called automatic bias by way of there having been some particular reason why Ms Hewitt-Gray ought not to have sat on the panel in this case at all. That is not alleged.

20. I turn to the law. The test of apparent bias is well established. In **Magill v Porter** [2001] UKHL 67; [2002] 2 AC 357, Lord Hope of Craighead said, at [103]: "The question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased." In **Lawal v Northern Spirit Ltd** [2003] UKHL 35; [2003] ICR 856 at [14], Lord Steyn observed, commenting on the **Magill** test: "Public perception of the possibility of unconscious bias is the key."

21. A number of the authorities therefore emphasise the importance of it being seen to be the case that the judge brought an impartial mind to the matter, and was open to persuasion by the evidence and the arguments, and of there not being any impression of prejudgment. The test turns not on what either of the parties may subjectively think or feel, but on what the fair-minded and informed observer would conclude. A number of authorities, such as **Helow v Secretary of State for the Home Department** [2008] UKHL 62; [2008] 1 WLR 2416, have considered what attributes this imaginary person might have, dilating particularly on the attributes both of being fair-minded and of being informed. I will refer for short to this person as the fair-minded observer.

22. While many of the authorities concern the conduct of a judge, whether sitting alone or as part of a panel, where an employment tribunal consists of a judge and two lay members, all of them are carrying out a judicial function when they hear and decide the case, and these principles apply to all of them. Further, where there is found to have been the appearance of bias or some other irregularity on the part of one member of a three-person panel, it is no answer that they were only one of three, and that the decision was unanimous, nor that the decision is not open to any other substantive criticism of its contents as in error of law. The parties are entitled to have the case properly heard, deliberated and adjudicated by the full panel of three, and to a decision that cannot have been tainted by the participation of a member who was apparently biased or not fully playing their proper part (see **Stansbury v Datapulse Plc** [2003] EWCA Civ 1951; [2004] ICR 523).

23. I have had the benefit of reading written skeleton arguments and hearing oral argument this morning from counsel on both sides. I will only summarise what seem to me to have been their respective main points.

24. For the appellant, Mr Kohanzad made a general submission that it would not be appropriate to take an over-analytical approach to the content of these posts, or each of them separately and in turn. People, he submitted, who look at LinkedIn threads and posts do not do that. They scroll, they scan, they skim-read, they form a general impression. It is the overall impression liable to have been created by these posts that matters.

25. He submitted that Ms Hewitt-Gray's response to the post by Ms Keating conveyed that she was thanking Ms Keating for her congratulations on a brilliant outcome and/or her vital role in a brilliant outcome. But for a member of the tribunal, there should be no such thing as a brilliant outcome. Their role is simply to do justice by participating in a decision as to who wins and loses each case in light of its merits. The response suggested that Ms Hewitt-Gray was personally invested in the outcome. It was equivalent to a solicitor or a barrister celebrating or promoting a victory. That was permissible for a representative, but not for a member of the adjudicating panel. Mr Kohanzad submitted that Ms Hewitt-Gray's response to Mr McDonald's post also gave the impression that she was, as he put it, having a dig at the respondent. He noted that the next response in the thread was another "brilliant", this time from Ms Perry. He emphasised the overall impression that was created by these threads as a whole, which was a celebration of the outcome.

26. Mr Kohanzad highlighted that LinkedIn is a networking site for professionals. Ms Hewitt-Gray's title on her page reflected this, referring to her professional qualifications and holding herself out as an HR specialist. Her posting of the link to the *Mail Online* article was, he said, a piece of professional self-promotion, implying that she was good at her job as an HR professional, because she had been involved in this case which was reported on the *Mail Online* website. But, while a lawyer can imply that

they have done a great job as a lawyer by winning a particular case, a tribunal member cannot imply that they are good at HR because they determined a particular case.

27. As well as referring to the **Magill** test and the emphasis by Lord Steyn in **Lawal** on the public perception of the possibility of unconscious bias, Mr Kohanzad also relied upon a particular passage in **Stansbury v Datapulse**. In that case, a lay member of the employment tribunal panel was said to have been drunk and appeared to have fallen asleep during the course of the hearing. Peter Gibson LJ, with whose speech Latham LJ and Sir Martin Nourse agreed, said at [33]:

> "Finally, what should this court decide in these circumstances? Did Mr Stansbury have the fair hearing to which he was entitled both under the general law and under Article 6? In my judgment, a hearing by a tribunal which includes a member who has been drinking alcohol to the extent that he appeared to fall asleep and not to be concentrating on the case does not give the appearance of the fair hearing to which every party is entitled. Public confidence, as Mr Kibling pointed out, in the administration of justice would be damaged were we to take the view that such behaviour by a member of the ET did not matter. In my judgment we should say firmly that the conduct of Mr Eynon at the hearing was wholly inappropriate for any member of a tribunal."

28. Mr Kohanzad also referred me to some passages from the *Guide to Judicial Conduct*, in particular Part 3 which includes the following statements:

> "Whilst fee-paid judges are not subject to the same degree of constraint as those who are salaried, they should not use their appointment as a means of pursuing personal, professional or commercial advantage."
>
> "Fee-paid judges should only use their title whilst acting in a judicial capacity."

Mr Kohanzad said that it appeared that the *Guide* overall applied to lay employment tribunal members as well as to salaried and fee-paid judges.

29. Mr Kohanzad accepted that not all conduct that was inappropriate or that might contravene the *Guide* would also necessarily give rise to the appearance of bias. But he submitted that the EAT should not fall into the error of creating what he called a false dichotomy between the two. He submitted that the danger of doing so was illustrated by **Stansbury**, in which the lay member was not actually biased, but

public confidence in the administration of justice would still have been damaged, had the court taken the view that his behaviour did not matter.

30. The EAT should therefore not necessarily view the present matter only through what he called the narrow lens of apparent bias; but should consider whether Ms Hewitt-Gray's conduct was such that it undermined public confidence in the administration of justice. In summary, submitted Mr Kohanzad, her conduct, and her use of the article as a way of marketing her professional services, did not give the appearance of a fair hearing and damaged the administration of justice.

31. For the respondent, Mr Griffiths submitted that the fair-minded and informed observer would not consider that there had been any real possibility of bias. They would not rush to judgment. They would consider the material and all the circumstances of the case with care. The mere posting of the link to the *Mail Online* article did not show any real possibility of bias. The post had no factual content of its own relating to the substance or outcome of the case, nor did the response to Ms Keating's post display any attitude of favour towards one party or the other. Rather, it conveyed the neutral sentiment that Ms Hewitt-Gray enjoyed her judicial work as an employment tribunal member. If Ms Keating's remark showed any bias on *her* part, that was the remark of a third party. Similarly, whatever the reader might make of Mr McDonald's post, Ms Hewitt-Gray's reply to it was factually accurate. Indeed, he said it could be read as setting right Mr McDonald's speculative assumption about what actually happened in this case.

32. Mr Griffiths also submitted that the appellant's case on this appeal, and subjective perspective on the matter, was coloured by the fact that the appellant had, in fact, lost. Referring to a passage in **Virdi v The Law Society** [2010] EWCA Civ 100; [2010] 1 WLR 2840, he submitted that it was a useful thought experiment to ask how matters would have looked, had Ms Hewitt-Gray said the same things that she said in the LinkedIn posts, during the course of the hearing and before the outcome was known. He submitted that this thought experiment served to show that there was nothing in what she said that pointed to an apparent bias towards the claimant.

33. Mr Griffiths also referred to the fact that lay members who sit on three-person employment tribunals are drawn, one from each of two panels. One is a person appointed after consultation with bodies representative of employees, and the other after consultation with bodies representative of employers. He submitted that the informed observer would be aware that Parliament has so provided, and would take this into account as a relevant circumstance when considering whether this material gave rise to a real possibility of bias.

34. Mr Griffiths also advanced an alternative contention which relied upon this same feature of lay members being drawn from two panels, in harness with a distinction, discussed in certain judicial review authorities, between what he called predetermination and permitted predisposition. Whereas the appearance of the former amounts to apparent bias, the presence of the latter does not vitiate the integrity of a decision. He referred me to the discussion of these concepts, and this distinction, in **R v Amber Valley DC, ex parte Jackson** [1984] 3 All ER 501, **R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd** [1996] 3 All ER 304 and **National Assembly for Wales v Condron** [2006] EWCA Civ 1573.

35. Mr Griffiths submitted that the distinction discussed in those authorities should be regarded as applicable to the approach to be taken to allegations of apparent bias by lay employment tribunal members, given that they are drawn from two panels in the manner that I have described. At its highest for the appellant, he submitted, the informed observer might think that Ms Hewitt-Gray's conduct was reflective of her predisposition, in view of her coming from one such panel; but they would be aware that this was permitted by Parliament. Any such predisposition did not amount to prejudgment and could not found a complaint of apparent bias.

36. My conclusions are these. First, I observe that I am not concerned with whether what Ms Hewitt-Gray did amounted to misconduct in her role; and I make clear that I express no view at all about that. I am concerned solely with whether it amounted to apparent bias such that the employment tribunal's

decision cannot stand. As Mr Kohanzad rightly acknowledged, the fact, if fact it be, that conduct *may* amount to judicial misconduct does not by itself necessarily mean that it also amounts, or may amount, to apparent bias. It might or might not be one or both. It would depend upon the nature of the conduct and all the particular facts and circumstances of the case.

37. Mr Kohanzad submitted, however, that there is in this case a broader question of whether the conduct undermined public confidence in the administration of justice, relying as I have noted on a passage in **Stansbury v Datapulse**.

38. Where I agree with Mr Kohanzad up to a point, is that the overarching principle is that the parties must have a fair hearing, and be seen by the public to have a fair hearing. If that not is not so, *that* is liable to undermine public confidence in the administration of justice. The importance of that cannot be overstated. There are a number of forms of what may be called compendiously procedural irregularity that can violate that principle, of which actual and apparent bias are only two. **Stansbury** was a case, not of some form of bias, but of a different kind of procedural irregularity. The problem there was not that the lay member appeared to be biased towards one of the parties but that he appeared not to have properly played his part in hearing the case.

39. Mr Kohanzad accepted that **Stansbury** was factually different in that respect from the present case; but he still urged his point about the importance of public confidence in the administration of justice not being undermined. However, that does not really, in my judgment, take his case any further in substance. It remains the case that the substantive basis on which this appeal is advanced, is that the LinkedIn posts gave rise to apparent bias, so that, it is said, for *that* reason the public, in the person of the informed observer, could not have confidence that justice had been done in this case.

40. I agree with Mr Kohanzad – and I did not understand Mr Griffiths to disagree with this point as such – that the fact that the LinkedIn exchanges occurred in point of time after the decision had been reached, promulgated and published does not *necessarily* mean that the informed observer could not regard

them as giving rise to a real possibility that Ms Hewitt-Gray was biased. It is not logically impossible that what a judge or lay member says about a case after it is over could cast evidential light back on how they approached the case when they were hearing it or participating in the decision. It is not hard to think of hypothetical examples. That, indeed, is one reason why judges and lay members should generally refrain from commenting extrajudicially on their own decisions, as opposed to allowing the contents of the decision to speak for themselves. I also agree with Mr Kohanzad that Mr Griffiths' suggested thought experiment is not a very helpful tool in this case, as the particular posts in this case related specifically to the outcome of the case.

41. However, it does not necessarily follow from the fact that Ms Hewitt-Gray saw fit to say something about this decision on LinkedIn, that what she said necessarily bespeaks apparent bias. The matter is acutely fact-sensitive, and so I must turn to the particular features of what was posted in this case upon which Mr Kohanzad relied.

42. As I have noted, he made an overarching submission about how people typically engage with online threads of this sort on LinkedIn or, indeed, other social media. I have no trouble with taking judicial notice of the fact that people will scroll and glance, without necessarily pausing to read properly, take time, or analyse with care, the meaning and contents of what has been posted, bringing to bear the forensic and analytical skills of a trained lawyer. But, as Lord Hope memorably said in **Helow** at [1], the fair-minded and informed observer is a "creature of fiction" who "has attributes which many of us might struggle to attain to". He also said at [2] that the observer who is fair-minded is "the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument". At [3] he continued:

> "Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines."

43. I add, therefore, that she would pause to read and consider the LinkedIn threads, and the impression they create, with care. She would not rely upon the first or the fleeting impression. Further, these posts were written in plain and colloquial English. They do not use any specialist legal jargon. Reading them with care, the informed observer would not need to struggle to form her judgment about what in substance she thought she could learn or take away from them.

44. I turn then to the submission that the informed observer would regard the fact that Ms Hewitt-Gray posted the link on the particular forum of LinkedIn, and referred to the fact that she sat as a lay member on the case, as a form of professional self-promotion. As to that, in my judgment the informed observer would at least consider that she wished to draw her followers' attention to the fact that she had been involved in a case that was regarded as in some way significant and newsworthy. The informed observer would also know that LinkedIn is a site specifically geared to professional networking, although those who engage and communicate with each other on it may sometimes also stray in their content beyond or outside of professional matters.

45. I agree with Mr Kohanzad that the informed observer would therefore infer that Ms Hewitt-Gray had, or at least may have, posted the link, not merely for the benefit of friends who might be curious about her work in the employment tribunal, but in the belief that to do so would somehow burnish her professional credentials with her professional followers.

46. However, I do not agree that the informed observer would infer that, by the act of posting this link on LinkedIn, Ms Hewitt-Gray had done something which indicated a real possibility that she had been biased in favour of the claimant who had on this occasion won. She did no more in that opening post than refer to the fact that she had sat on the case and that it had been reported in the *Mail Online*.

47. The images imbedded in the link included the *Mail*'s headline, which included a quotation from the decision, and conveyed the very broad nature of the case and recorded the amount of compensation awarded. But these were only themselves reflections of what the case was indeed about, what the tribunal

had indeed at one point said in its decision, and of the amount that the tribunal had indeed awarded – though I note that the description of the claimant as an office secretary was not accurate and was not taken from the tribunal's decision. The informed observer would also, in my view, understand that the other material that appeared embedded with the link, being photographs and the headline, had not itself been selected by Ms Hewitt-Gray.

48. Further, Ms Hewitt-Gray did not herself comment on the *Mail* headline or coverage having highlighted these particular aspects, nor about the case at all, beyond the fact that she had sat on the panel and the fact that the decision had been reported by the *Mail Online*. She did not herself say, or add, anything about the outcome or substance of the case or the tribunal's decision. Whatever else they might think of it, I do not see, therefore, that the informed observer would conclude, whether from the fact of that initial post or from the content, that there was a real possibility that Ms Hewitt-Gray had been biased towards the claimant when hearing the case and participating in the decision.

49. I turn to the ensuing exchange with Ms Keating. I agree with Mr Kohanzad that the informed observer would consider that Ms Keating's description of the outcome as "brilliant", and her avowed delight that Ms Hewitt-Gray had played a vital role in it, conveyed her particularly strong satisfaction at the result of this particular case. They would consider that, for whatever reason, Ms Keating was particularly pleased that this claimant had won this particular case, that she had been awarded the amount of compensation that she was awarded, and/or that this respondent had lost this particular case.

50. Had Ms Hewitt-Gray herself written something substantially similar in her own post, that might have caused the informed observer to be concerned that there was a real possibility that she would have been rooting for the claimant from the start. However, Ms Hewitt-Gray did *not* write that post, nor anything similar. It is perfectly clear that she did not write it, and the informed observer would not be so cursory and inattentive in scrolling this material as to be confused or mistaken about that.

51. Nevertheless, descending to a closer analysis, Mr Kohanzad focuses on the opening words, of the response: "Thank you, Denise," which he submits the informed observer would read as signifying that Ms Hewitt-Gray, too, considered that this was a brilliant outcome. However, in my view, the informed observer would read and appraise the content of Ms Hewitt-Gray's response as a whole. They would note that the substantive part of it does not refer to this particular case or decision at all, but, rather, to Ms Hewitt-Gray's *general* role sitting as a lay member of the employment tribunal, including that she enjoys that general role and thinks it an honour to do it.

52. I do not think that the informed observer would consider that, merely because this response opened with the words "thank you", it conveyed Ms Hewitt-Gray's endorsement of Ms Keating's assessment of the outcome of this particular case as "brilliant". Indeed, they might be inclined to think that, in responding in the way she did, Ms Hewitt-Gray was, in fact, deliberately *not* commenting on this particular case or decision, but rather on her general role, in order implicitly to gently move herself away from what might be perceived by readers of the thread as a partisan appraisal of this particular decision by Ms Keating. Be that as it may, the informed observer would not read the post as a whole as conveying that Ms Hewitt-Gray was adopting or associating herself with Ms Keating's enthusiastic reaction to the particular outcome of this case.

53. I turn to Ms Hewitt-Gray's response to the post from Mr McDonald. Once again, whatever the impartial observer might make of Mr McDonald's post, they would appreciate that it was not Ms Hewitt-Gray's post. Her reply to him, unlike her reply to Ms Keating, did, however, pass comment on one aspect of the substance of the case. But it essentially answered his question about that, in a way that factually accurately reflected the position and the contents of the decision. This exchange was potentially heading into dangerous territory. But, in fact, it ended there; and given the accuracy of what Ms Hewitt-Gray said about the actual facts of this case, I conclude that while, as they began to read this part of the thread, the

informed observer's hand may have moved towards the apparent bias alarm button, they would not, ultimately, have set it off.

54. Finally, the rejoinder from Ms Perry adds nothing. She evidently agreed with Ms Keating, coincidentally or not, that the decision was "brilliant"; but the informed observer would not attribute her remark to Ms Hewitt-Gray.

55. I therefore conclude that, applying the **Magill v Porter** test, and doing so no differently to a lay member than they would to a judge – and whatever else they might make of the wisdom or appropriateness of Ms Hewitt-Gray having posted the link to the *Mail Online* article on LinkedIn in the first place, which appears also then to have triggered the responses that were addressed to her and to which she replied – the impartial and informed observer would not infer from this material that there was a real possibility that Ms Hewitt-Gray had been biased towards the claimant in this case, by prejudging the matter, or deciding it other than on its merits.

56. I have reached this conclusion without regard to Mr Griffiths' additional submissions by reference to the fact that lay members are drawn from two panels in the manner I have described and/or his contention that the concept of permitted predisposition (drawn from the context of judicial review of decisions of elected members of planning authorities) has some application to the position of lay members of employment tribunals, acting in a judicial capacity, so allowing for a more tolerant approach to allegations of actual or apparent bias against them.

57. In truth, though he sought to advance two points here, it seems to me that in substance there is only one. Either this feature of how lay employment tribunal members are appointed points to something that can, in the context of a claim of actual or apparent bias on the part of a lay member acting judicially, be regarded as potentially relevant to the application of the test in that context, or not. I do not have to decide the answer to that because, for the reasons I have given, I have concluded that, applying the unvarnished **Magill v Porter** test to this material, it is not satisfied. As Mr Kohanzad also points out, the appeal was

not advanced on the basis of any information or assumption about which of the two panels Ms Hewitt-Gray actually came from.

58. As it is not necessary for me to decide the "predisposition v predetermination" argument, I will say no more about it.

59. For the reasons that I have given, this appeal is dismissed.