Appeal No. UKEAT/0633/04/DZM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 1 August 2005
Judgment delivered on 12 September 2005

Before

HIS HONOUR JUDGE ANSELL

MS K BILGAN

MR B M WARMAN

CALOR GAS LTD — APPELLANT

MS D BRAY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D PANESAR (of Counsel) Instructed by: Messrs Eversheds LLP Solicitors 115 Colmore Row Birmingham B3 3AL
For the Respondent	Debarred from proceedings

SUMMARY

Tribunal incorrect in holding that consultation regarding redundancy during maternity leave was extended to the end of the maternity leave. Tribunal displayed clear hostility and partiality during hearing amounting to bias.

HIS HONOUR JUDGE ANSELL

1. This is an appeal from a Decision of an Employment Tribunal sitting at Hull following a hearing in May 2004. The Tribunal, in Reasons delivered to the parties on 18 June 2004 unanimously decided that Mrs Bray's complaint that she had been unfairly dismissed pursuant to Section 99 and Regulation 20(1)(b) of the **Maternity and Parental Leave Regulations 1999** was well-founded, but that she had also been unfairly dismissed pursuant to Section of the **Employment Rights Act 1996** and that she had been unlawfully discriminated against on the grounds of her sex pursuant to the provisions of the **Sex Discrimination Act 1975**.

2. The grounds of appeal are divided between bias and also further errors of law. Leave for this hearing was given at a preliminary hearing on 11 January 2005 presided by HHJ Pugsley. In relation to the allegations of bias, a schedule has been prepared by the Appellants incorporating the allegations and also the response of the Chairman and Members of the Employment Tribunal. The Chairman has also commented in a letter dated 1 February 2005 in relation to several of the grounds of appeal and we will refer to that letter below.

3. Unfortunately, although the Respondent appeared and was represented below, she has taken no part in the appeal proceedings, although Mr Panesar, Counsel for the Appellants advised us at the hearing that Mr Williamson, the Respondent's solicitor, was still on the record. As a result of her failure to both file an Answer to the Notice of Appeal, to respond EAT letters and also to complete the schedule of bias allegations, the Registrar of this Court made an order on 23 June debarring the Respondent from taking further part in this appeal.

4. Whilst Mr Panesar has presented the Appellants' case in a fair and even-handed way, it would certainly have been helpful to us to have heard either from the Respondent or her representative, particularly as regards the allegations of bias. We should record, however, that we have had the benefit of very detailed notes of evidence that were taken by Shazia Ali, the Appellants' solicitor, who was present throughout the EAT hearing and we commend her on the detail of that note. Indeed, in so far as those notes have been incorporated into the schedule of bias, the Chairman and Members do not seek to doubt their accuracy.

5. The background of facts is that the Respondent was the depot manager of the Appellants' branch at Immingham. She reported to Mr Gorman who had ultimate responsibility for that depot. From 2002, the Appellants created 12 regional offices known as Customer Operation Centres which included a nearby depot at Elland, but not that of Immingham. From May 2003, Mr McFarland was the Customer Operations Manager at Elland and also assumed responsibility for relevant customer services at Immingham. The Respondent's responsibilities were to deal with the operations team including bulk schedules, drivers, fitters and the workshop supervisor and Mr McFarland's role was at a higher managerial level than that of the Respondent.

6. Also, in early 2003 as a result of certain absences at Immingham, certain of the work normally carried out there was moved to be dealt with remotely from Elland and as a result of the success of that move, Mr Gorman prepared a document summarising his views as to how the allocation of work between Immingham and

Elland might change. The Tribunal described it as a relatively detailed document and in due course, save for one or two minor amendments, it was carried into effect. One of the results of this plan would be for the role of depot manager at Immingham (the Respondent's role) to be removed.

7. By the time of Mr Gorman's initial plan, he was aware that the Respondent was pregnant and, indeed, there was a reference in the document to her potential maternity leave during late 2003 when these proposals might be implemented. This proposal was submitted to Mr Gorman's line manager, Mr Donald. The Tribunal criticise the Appellants' witnesses to the extent to which discussions on the proposal took place in the subsequent period up to September 2003 and, indeed, on other issues within the case and refer to substantial inconsistencies between the various witnesses, their witness statements, the oral supplementary evidence and cross-examination comparing this to the Respondent whom they found to be a reliable and truthful witness.

8. The Respondent went on maternity leave from 25 July 2003, giving birth to her child on 14 August 2003. The Tribunal was satisfied that between May and August, there were frequent discussions between the relevant managers about the plan and, in particular, from the end of July when the Respondent went on leave, Mr McFarland was able to crystallise his views since he was covering the role at Immingham as depot manager. By the end of August 2003, a firm document had been prepared with proposals for reorganisation which would include compulsory redundancies including the Respondent and a detailed time-table was prepared as

regards the consultation exercise, although there is no finding by the Tribunal as to whether a firm dismissal date for those being made redundant was set out in the plan.

9. The consultation exercise could not commence until 26 September 2003 for the convenience of Mr McFarland and Miss Owen of the HR team, although at that time, Mr Gorman unfortunately was away. Although Mr Gorman sought to differentiate the August proposal from his earlier plans, the Tribunal, as we have already indicated, found no real difference between the two documents. Mr McFarland went to see the Respondent at home on 25 September to outline the plans to her and it came as no surprise to her that she was to be made redundant. She was told that there was to be a meeting the following day at the depot and she was asked to attend, which she did. A prepared document was read to the meeting including a statement that there would be consultation over a one month period with all affected employees, together with the following comment: "Your views on the proposals are important to us and will be listened to. Feedback on any issues raised by you will be given as soon as practically possible. Every attempt will be made to reduce the impact of these changes as they affect you individually".

10. The process was criticised by the Tribunal both in relation to the fact that the Respondent was not given a few days' grace to "lessen the shock", as the Tribunal put it, of the announcement and also that although the Appellants had taken some six months to refine their proposals, the Respondent was being asked to put forward her observations instantly. Although the Respondent made some initial comments in relation to the proposals concerning the merger of the two depots, the bulk of the consultation process thereafter dealt exclusively with attempts to find alternative

work. The Tribunal also criticized the Appellants' witnesses, particularly Mr McFarland who is alleged to have told the Respondent when asked how long the proposals had been determined, he replied: "Three weeks ago". She then asked: "Had there been any discussions before I began on maternity leave?" to which the answer was: "no".

11. The Tribunal then spent some time analysing the proposals that were advanced by the Respondent in relation to other employments with the Appellants. She had raised the possibility of taking over the role of one Andy Allen, who was not an employee of the Appellants, but worked for Manpower, an agency who provided drivers to the Appellants and whether or not she would be able to take over his role which included both driving and administrative work at Immingham and two other depots. His work involved driving class 1 vehicles and the Respondent already held a provisional class 1 LGV licence as well as an ADR certificate which was relevant, given the nature of the Appellants' product, although neither of those facts was ultimately known by Mr Chambers to whom her request in respect of Mr Allen's position was ultimately referred. There was also a request by the Respondent to be considered as a class 2 LGV driver, but this would have required training and before doing so, it was suggested that she would engage in a trial. The Appellants could only provide that trial through their authorised trainers who were based either in Warwick or at Grangemouth near Edinburgh and for a trial to be carried out immediately, it meant that she had to travel up to Grangemouth. The Respondent believed that this would involve a three day journey, although this was because she preferred to drive rather than fly but she was unwilling to leave her child for that period. The Appellants had contended at the hearing that the journey could be done by plane in

one day. The alternative would have been for one of the two trainers to travel to Immingham and the Tribunal criticised the Appellants for not considering this proposal and on a number of occasions, comment that because of her maternity leave, the Respondent would be entitled to ask that the consultation period which was fixed to finish on 24 October should be extended.

12. In any event, the Respondent did not accept any of the alternative proposals that were made and concluded that she would not travel to Grangemouth for the vehicle trial and she therefore accepted the Appellants' redundancy package, her employment being terminated on 24 October 2003.

13. The Tribunal rejected the Respondent's primary contention that she had been automatically unfairly dismissed because the principal reason for the dismissal was connected with her pregnancy or maternity leave but found that she had been automatically dismissed because whilst being made redundant during her maternity leave, she had not been offered suitable alternative employment which was available to her, either Mr Allen's job or as a class 2 driver.

14. The Tribunal also found the dismissal to be unfair in relation to the absence of proper consultation either from March 2003, when the proposals were at a formative stage, or at the very latest from June or July when there was adequate material on which she could have consulted. There was also unfairness in relation to the speed of the consultation process once it commenced and the failure to advise her that the consultation could be extended to at least February 2004, which was the end of her ordinary maternity leave, or even during the period of additional maternity leave. The

Tribunal also criticised the speed in trying to force through the Grangemouth arrangements, again bearing in mind that the Respondent was not due to return to work until January 2004 at the earliest. The Tribunal finally concluded that there was sex discrimination in that the inference from their failure to offer Mr Allen's position was that the Appellants did not want to employ on their own staff female drivers.

15. We turn firstly to the errors of law before considering the issue of bias. The first complaint relates to the Tribunal's findings expressed in both paragraphs 40 and 48 that she was entitled to be offered alternative employment because of her pregnancy up to the end of her additional maternity leave in August 2004. They record Mr Panesar accepting that principle as a matter of law, although on the facts of the case, her entitlement ended because she chose to put an end to the consultation period and accept the redundancy payment.

16. Regulation 10 of the **Maternity and Parental Leave Regulations 1999** provides that:

> **"1. This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.**
>
> **2. Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (and takes effect immediately on the ending of her employment under the previous contract).**
>
> **3. The new contract of employment must be such that -**
>
> **(a) The work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and**
>
> **(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract"**

17. The issue of the concession made by Mr Panesar was taken up with the Chairman and he responds in his letter of 1 February in which Mr Panesar is recorded as saying that the consultation would have run on until the "applicants elected to drop out". Mr Panesar's recollection is that the concession made related to the possibility of the consultation being extended during the maternity leave, should the Respondent have requested it but, in fact, she opted to bring the consultation period to an end by accepting the redundancy package. We are, however, concerned by the Tribunal's view, which is repeated on several occasions in the decision, that the consultation period would be automatically extended by virtue of the maternity leave. We agree with Mr Panesar's submissions that the approach of the Tribunal as regards Regulation 10 should be firstly to consider whether or not it was practicable by reason of the redundancy for her current employment to continue. This would seem to us to involve the employers satisfying a tribunal that it was necessary to implement the redundancy during the period of maternity leave. The Tribunal would then have to determine when the existing contract of employment would be terminated and determine whether a suitable alternative vacancy was available to the employee prior to the termination of her existing contract of employment. Mr Panesar conceded that it could be argued that the normal consultation period might have to be extended because of the special circumstances involved in the employee's maternity leave and the ability to come to a decision about the alternative proposals in the light of the fact that the employee was not actually working at the time. However, in the absence of any specific finding that the need to implement this redundancy could be postponed until the Respondent returned to work, we cannot accept that the proper interpretation of the Regulation 10 means that the consultation period during which time suitable alternative vacancies can be considered is automatically extended until the employee

does return to work. We are reinforced in this view by consideration of Regulation 7(5) of the 1999 Regulations which provides that:

> **"where the employee is dismissed after commencement on ordinary or alternative additional maternity leave period before the time when (apart from this paragraph) that period would end, the period ends at the time of the dismissal".**

It seems to us that it is open for an employer to dismiss on the grounds of redundancy during a maternity leave period, subject to the considerations that we have already outlined. The Tribunal's view that the consultation period could be extended to at least to the end of February 2004 or some late date appears to guide their view as to the time that was available for the Respondent to assess and to take part in the driving trial. It seems to us that the error which they fell into regarding the extension of the consultation period may well have clouded their views as regards the reasonableness or otherwise of the employer's approach concerning the proposed trip to Grangemouth.

18. The next error of law alleged is that the Tribunal in paragraphs 49 and 50 of the Extended Reasons erred in law in finding that the Appellant had discriminated against the Respondent in not offering her a driver's role, having previously caused the Appellants to excise their evidence rebutting that allegation which the Respondent had purported to withdraw. The Appellant had presented evidence expressly rebutting the allegation that it had not employed the Respondent or female drivers on the grounds of their sex. That evidence was to have been given by Sally Owen, the Appellant's human resources manager. On the second day of the hearing, Mrs Owen was in the course of reading a passage of her witness statement that dealt specifically with this issue, aimed at showing that there was no discriminatory reason for the lack of female drivers within the company. The Chairman interrupted and said to Mr

Williamson, the Respondent's solicitor: "It may be in the ET1 that the company does not have any female drivers but it does not say that there is a widespread discriminatory policy in operation". Mr Williamson agreed with that statement and said it was not part of the Respondent's case and the Chairman then added "We will want to omit paragraph 9 of the statement then". In his closing submissions, it appears that Mr Williamson attempted to reintroduce the issue and suggested that by not being given Andy Allen's job, this amounted to less favourable treatment. In giving their reasons in paragraph 50, the Tribunal said this: "The Respondent does not employ, on its own staff, any female drivers. It uses two female drivers who are employees of Manpower" and they then went on to find that the Respondent had suffered less favourable treatment than a hypothetical male depot manager. We are of the view that the Tribunal were in error to indicate during the hearing that the issue was being withdrawn, thereby preventing the Appellants calling evidence from Sally Owen, only to re-introduce it as a factor in relation to their decision as to sex discrimination in their reasons.

19. The next ground concerns criticism by the Tribunal of Mr Panesar's cross-examination of the Respondent. At paragraph 23, it records that Mr Panesar sought to ask her about her child care arrangements generally, and whether her parents lived near to her house or otherwise in terms of providing child care. The Tribunal commented that "it goes without saying that questions of that effect would not have been asked of a man in a similar situation" and concluded that the questions directly infringed the Respondent's **Human Rights Act** right to privacy under Article 8 and they ruled that Mr Panesar was not entitled to ask such questions. In paragraph 23:

> **"The asking of those questions was indicative of sex discrimination on the part of those instructing Mr Panesar"**

and in paragraph 51:

> **"There are evidence of the overall approach taken by the Respondent to this Applicant's entirely legitimate wish to continue in the employment of the Respondent. In our view, this was here blatant sex discrimination".**

20. Mr Panesar contends that the Tribunal's ruling in preventing him asking these questions and their subsequent comments in their decision were totally unjustified since the questions went to an issue in the case, namely that the Respondent had maintained during the redundancy process that she was unable to travel as part of her job by reason of her family circumstances. He also reminded us that the lay members put personal questions to two of the Appellants' witnesses. Bearing in mind the issues in the case, we cannot find anything wrong in the questions that Counsel was seeking to ask of the Respondent.

21. The next complaint relates to the Tribunal's findings at paragraph 41 when in dealing with the issue of suitability of an alternative vacancy for the purpose of Regulation 10, the Tribunal said this:

> **"It seems to us that since that provision is to be interpreted as for the benefit of the Applicant, not the Respondent, it is for an employee, in the position of this Applicant, to make that decision entirely for herself. It is not for the Respondent to say that any such position does not comply with the statutory description. The issue of suitability is particularly important since, under Regulation 20, an employee who is dismissed is entitled under Section 99 under the 1996 Act to be regarded for the purposes of Part 10 of the Act as unfairly dismissed if "the reason or principal reason for dismissal is that the employee is redundant and Regulation 10 has not been complied with".**

Mr Panesar argues that suitability is not an issue for the employee involved but is an issue to be determined by the Employment Tribunal, particularly bearing in mind the factors set out in Regulation 10(3) i.e. the work must be suitable in relation to the employee and appropriate for her to do in the circumstances and the terms and conditions not substantially less favourable than her previous employment. In the

experience of the lay members of this Tribunal, vacancies may arise either because they are suggested by the employer as potentially suitable, in which case the employee's reasons for refusal would have to be judged by a tribunal or alternatively, the employee will suggest a job and the employer's refusal or conditional acceptance will again have to be judged in the light of the statutory tests. To suggest however, as the Tribunal did, that the decision is "entirely for herself" seems to us to omit the Tribunal's role in assessing whether or not the employee's decision is reasonable in all the circumstances.

22. The next ground related to the questioning by Mr Panesar in relation to the Respondent's personal circumstances and the allegation that the questioning also breached her human rights under Article 8. We have already dealt with this issue above.

23. The next ground relates to a passage in paragraph 16 of the Reasons. The Tribunal said this:

> **"The first consultation meeting with the Applicant took place immediately after the general announcement was made. We have found, from experience of these matters, that many employers now take the view that an employee will be in some state of shock immediately such an announcement is made and that it is therefore preferable, for both sides, to delay any individual consultation meeting for a period of say three or four days at the minimum, to allow for that state of shock to lessen…."**

24. Mr Panesar submits that there was no evidence of the assertion that the Respondent was in shock at the first consultation meeting or otherwise and, indeed, she confirmed that she was not surprised with the announcement of potential redundancy when she met with Simon McFarland the previous day. It was never asserted by her at any time that she was in shock or in a similar state as a result of the

first consultation meeting nor did she ask for the consultation process to be delayed, confirming in evidence that she wished for the issue to be so determined. Whilst we accepted that it was open to the Tribunal to comment in general terms as to the advisability of handling this issue sensibly in light of the Respondent being on maternity leave and her having undergone an operation six weeks previously, we are critical of the Tribunal's approach in paragraph 16, although taken by itself, would not be regarded by us as sufficiently serious to justify the Tribunal's decision being set aside.

25. The next complaint relates to a comment in paragraph 24 by the Tribunal that the Appellant organisation was of such a size that they could have made travel arrangements on behalf of the Respondent in connection with the trip to Grangemouth. Mr Panesar submits that again, this was an unfair comment in light of the fact that the issue as to who was going to make the travel arrangements never arose in the case. Indeed, he tells us that the Appellants had offered to pay for the flights (see page 170 of the transcript). He submits that the main issue was whether or not the Respondent was willing to spend three days away from home in light of her perception that she preferred to drive rather than fly although by the time of the Tribunal hearing, she appeared to have accepted, in cross-examination, that the trip would not have taken that long. The Tribunal here appears to have commented upon an issue that was not raised in the case.

26. The next complaint relates to a passage in paragraph 28 of the Reasons where the Tribunal said this:

> **"The Applicant's view was that she would have to be away from Immingham, and her new-born baby, for some three days if she was to travel to**

> **Grangemouth. Nothing was said by the Respondent's managers to dissuade her from that view"**

Mr Panesar submits,. in the course of cross-examination of the Respondent, he suggested to her that Mr McFarland could have told her that she could go and return to Grangemouth in one day. This had been in his evidence. The transcript records that when that question was put by Mr Panesar, the Chairman interrupted in these terms: "This doesn't matter, does it?" The Tribunal's comments appear to us to be unjustified in the light of the Chairman's intervention.

27. The next comment relates to a finding in paragraph 11(2) that the Appellants had operated an unfair procedure in having someone other than her line manager inform of her potential redundancy. The ET stated:

> **"We heard no satisfactory evidence as why the consultation period had to start while Mr Gorman was not present, bearing in mind that he was the line manager of the Applicant".**

Mr Panesar complains about this comment since he contends that there is no legal or other requirement that consultation in the context of redundancy has to be carried out by the immediate line manager. Whilst we accept that position, we find no error in the comment made by the Tribunal which was open to them on the evidence presented in the case

28. Finally, Mr Panesar criticised the passage in paragraph 22 of the Reasons where the Tribunal said this:

> **"In so far as the Applicant was criticised during these proceedings for not volunteering for positions described as "professional salesman", those criticisms were entirely unjustified. It seems to us that it is for each individual employee to make his or decision as to a particular type of work which might be regarded as suitable. The Tribunal took a firm line with Nr Panesar, rejecting his suggestion that the Applicant ought to have considered that job and that her failure to do so was in any way relevant or material to the fairness of the overall decision otherwise made by the Respondent".**

29. In so far as the Tribunal was suggesting that the Applicant had the final decision in terms of the suitability or otherwise of any position that was offered to her, we have already commented that that view cannot be correct. As far as the particular position was concerned, there was evidence before the Tribunal that the Respondent had given reasons why she rejected that position because of the long hours involved in the role and, in our view, it would have been better for the Tribunal to deal with that evidence on that basis. Overall, however, we do not feel that it has affected the fairness of the decision.

30. We turn now to the issue of bias. The well-known test was set out by Lord Bingham in **Porter v Magill** [2002] 1AER 465 at paragraph 103 where he said thus:

> **"The question is whether the fair-minded and informed observer, having considered the facts, would have concluded that there was a real possibility that the Tribunal was biased".**

Lord Bingham went on in paragraph 104 as follows:

> **"Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said ((1997) 96 LGR 157 at 174) that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of assertions that he was unbiased. Looking at the matter from the standpoint of the [air-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons".**

31. We mention that passage since, in the schedule of bias dealing with the general allegations of the Tribunal displaying a hostile and aggressive attitude to the Appellant's witnesses and to the allegation that the cross-examination of the Appellant's witnesses was conducted at times in tandem by the Chairman and the Respondent's Counsel, the Tribunal's response has been that although there were

frequent interruptions from the Tribunal, they believed that they were equally apportioned to both sides and in terms of cross-examination, the practice of the Chairman to ask questions by way of clarification at the time the issue arises was applied equally to the Respondent.

32. The task facing this Court in assessing the allegations of bias was helpfully set out by Simon Brown LJ in **R v Inner West London Coroner ex parte Dallaglio & Another** [1994] 4 AER 139, where at page 151F he set out the following propositions:

> **From R v *Gough* I derive the following propositions:**
>
> **(1) Any court seised of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts.**
>
> **(2) It necessarily follows that the factual position may appear quite differently as between the time when the challenge is launched and the time when it comes to be decided by the court. What may appear at the leave stage *to* be a strong case of 'justice [not] manifestly and undoubtedly be[ing] seen to be done', may, following the court's investigation, nevertheless fail. Or, of course, although perhaps less probably, the case may have become stronger.**
>
> **(3) In reaching its conclusion the court 'personifies the reasonable man'.**
>
> **(4) The question upon which the court must reach its own factual *conclusion* is this: is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility".**

Mr Panesar's submission is that the particular bias in this case took the form that from an early stage in the hearing, it was apparent that the Tribunal strongly disapproved of dismissal during maternity leave whether lawful or otherwise and regardless of any redundancy situation or other regarding circumstances. Whether for that reason or otherwise, the Tribunal's conduct, he submits, was overwhelmingly hostile to the Appellant, their witnesses and, indeed, himself in a manner that he contends went

significantly beyond the normal dialogue and exchange of views between a Tribunal and the parties and all advocates to a case.

33. Mr Panesar submits that, from perusal of the transcripts, it would be apparent that the Tribunal i) displayed a hostile and, on occasion, an aggressive attitude to the Appellant's witnesses involving numerous hostile interventions by the Tribunal whilst they were giving evidence; ii) conducted the case with an unjustified disparity of treatment between the parties – for example, barring the Appellant from cross-examination on a number of matters at issue and intervening in both cross-examination and submissions on the Appellant's behalf; iii) the cross-examination of the Appellant's witnesses being conducted at times in tandem by the Chairman and by the Respondent's Counsel; iv) repeatedly interrupting Mr Panesar's cross-examination of the Respondent, often suggesting a response to the question and effectively rendering it impossible to present and conduct the case effectively; v) deciding matters of fact against the Appellant before they had an opportunity to present their evidence and make representation; vi) placing unjustified time limits upon the cross-examination of the Respondent; vii) expressing views that indicated a closed mind to the Appellant's witnesses and case.

34. We have looked at the approach of the Chairman and the Members to the evidence given by the Appellant's witnesses. When Mr McFarland was being cross-examined by Mr Williamson, there were quite frequent interruptions by the Chairman who appeared to be joining in the cross-examination. At the end of the cross-examination, there were questioning by the Chairman and the wing members and the following morning, Mr Panesar re-examined and again, we note quite frequent

interventions by the Chairman. In terms of the next witness, Mr Gorman, the Chairman's questions followed the cross-examination by Mr Williamson and occupy more pages of transcript than Mr Williamson's cross-examination.

35. When one turns to the Respondent's evidence and the cross-examination conducted by Mr Panesar, again there were frequent interruptions by the Chairman expressing criticism of the questions that Mr Panesar was putting to the witness. We note on page 159 of the transcript that Mr Panesar objected to the interventions that were taking place. Nevertheless, they continued on to the following page, 160 and also onto page 161. More interruptions can be seen on pages 162, 163, 164, 165, 168, 169, 170 and 171, where again, Mr Panesar registers his concern. There were further interruptions on pages 175, 176. When the cross-examination resumed on the third morning, there were further interruptions on pages 189, 190, 191 and 192.

36. Turning to the particulars of bias in the schedule, items 5 to 13 cover the questioning of Mr McFarland by either the Chairman or the wing members. Having read through the passages in detail, we are left with the clear impression that they had at times crossed over what we accept as a difficult boundary between rigorous questioning and offensive cross-examination in a case where both parties were legally represented by experienced advocates. In number 6, one sees a comment by the Chairman "Mr McFarland, I am not a fool, neither is the Applicant. Let me put it to you, let me be less aggressive". In item 7, commenting upon the information in Mr McFarland's statement in relation to the Manchester to Edinburgh flight, the Chairman said this: "This does not make it relevant to the Applicant's situation. It simply should not be in there". In number 8, in relation to the genuineness of the

consultation process, again the Chairman cross-examined Mr McFarland expressing a concluded view: "I don't understand how it would have been quicker if she had been there". In item 9, Mr McFarland at one stage referred to his witness statement when answering a question in re-examination which provoked the following response from the Chairman: "Mr McFarland, this isn't about working from a script. You may remember what is on the page, but you may not read from it". In item 10, at the end of an exchange between the Chairman and Mr McFarland in relation to the differences between the proposals made in March 2003 and Mr McFarland's proposal at the end of August, the Chairman commented as follows: "I am not troubled with your internal processes. There is nothing in the document which says it is not viable". In further questioning of Mr McFarland in relation to when the decision was made in relation to redundancy, in item 11, is recorded this exchange:

"Chairman:	**You only found out it was viable when you were doing it.**
Answer:	**In fact, yes, but I would have anyway.**
Chairman:	**Ah, that was what I was after 'in fact'"**

In item 12, in answer to questions from one of the lay members, there is a comment by the member in relation to whether or not the travelling issue was explored: "There is no evidence that she raised these issues".

37. Later, in the course of the questioning of Mr Gorman, the Chairman made these comments:

> **"Look, I am sure this is the case. This case is about 12 depots turning into custom operation centres. Stop playing with semantics please.**

38. Reading through all the extracts on the schedule leaves us in no doubt that, regrettably, the Chairman and lay members overstepped the line and entered into the

fray in such a way that an impartial observer to the proceedings would be left with a clear impression that the Appellants did not have a fair hearing. The suggestion from the Chairman that both sides were treated in the same way is simply not made out by close analysis of the interventions that took place and the nature of those interventions. When the Appellants' witnesses were giving evidence, and/or Mr Panesar was cross-examining the Respondent, the interventions lacked fairness and impartiality. The same was not true in terms of the Respondent giving evidence on Mr Williamson's cross-examination. Indeed, at times, there was no distinction to be drawn between Mr Williamson's cross-examination and that of the Chairman.

39. The danger of this approach is that the partiality shown may have had an impact on the Tribunal's view in relation to the central issue in the case, namely that suitable alternative vacancies, as will be seen from our comments in relation to the alleged errors of law, we believe that the Tribunal's attitude did have an impact in relation to the issues that we have identified.

40. Accordingly, our overall conclusion is that the Tribunal's decision must be set aside and a re-hearing ordered before a different Tribunal.