UK Employment Appeals Tribunal. Bias. Chairman's provisional indication on the case plus lengthy examination of a witness by the lay member held not to amount to bias. 5th November 2003.

HIS HONOUR JUDGE ANSELL (MR G LEWIS, MR H SINGH)

1. This is an appeal against a unanimous Decision of an Employment Tribunal who, following a hearing in Brighton in September 2003, unanimously decided in written Reasons, promulgated on 30 December 2003, that the Respondent hade been unlawfully discriminated against on the grounds of his disability and also had been unfairly dismissed.

2. On 29 May 1990 the Respondent commenced employment with the Appellant in their Highways Department, and that employment continued until 2 July 2002, when it was terminated on the grounds of ill-health. During the period of his employment there were a number of problems surrounding the working relationship between the Appellant's managers and the Respondent, concerning particularly the issues of promotion and salary. During the period of his employment the Tribunal found that he did not receive a salary increase and was turned down for promotion on a number of occasions. As a result of stress related to his working environment, he was off work for a period of six months in late 1995 and again in September 1999. In September 1999 Dr Westlake, the Respondent's Occupational Health Advisor, considered that the Respondent's illness was work-related.

3. In April 2001 the Respondent again applied for a promotion in the Highways Department but was rejected in favour of a less experienced engineer whom the Respondent had helped to train. The Respondent was off work from 17 April 2001 for stress and depression and did not return to work after that date. He saw Dr Westlake again on 30 May, 17 July and 19 September 2001. In May Dr Westlake advised that at his next meeting he intended *"to give serious consideration as to whether Mr Hafez should be regarded as disabled"*. In his report of 17 July he advised that Mr Hafez: ***"…should, to all intents and purposes, be regarded as disabled under the Act and that the Council, as his employer, is under the additional duty of care to ensure that any reasonable adjustments necessary are made to enable him to remain in employment."***

   In his final report in September he advised that ***"…it is my firm opinion that the breakdown in working relationships between Mr Hafez and his immediate managers is the root of his current illness and resulting disabilities. I consider it still the case that he should be regarded as disabled…One possible reasonable adjustment that could be made… would be to convene a facilitated meeting… in order to identify those difficulties which are perceived with this and to negotiate the way forward."***

   Thereafter the Appellants tried to arrange a mediation meeting with Eastbourne Community Mediation Service with the assistance of the Respondent's union, Unison, and meetings did occur on 16 November 2001, 25 January 2002, 8 March 2002 and 2 May 2002, but the Tribunal found that the Appellants did not attempt to carry out any reasonable adjustments, such as giving the Respondent alternative reporting lines, phased return to work, or lesser responsibilities. At the meeting in May, the issue of ill-health retirement was raised by the Union Representative, and on 8 May 2002, Dr Westlake considered that the Respondent was "permanently incapable of returning to his employment". On 17 June 2002, Dr Simpson reported that he considered that the Respondent was unable to return to normal employment and he would support his application for ill-health retirement. The Respondent was unwilling to accept this retirement because of the small amount of the retirement pension and retirement grant. However on 2 July the Respondent met Alison Robins, the Employment Relations Advisor, to discuss ill-health retirement and he was informed that his employment was being ended that day on medical advice, with an effective date of termination of 30 September 2002.

4. The grounds of appeal raise four main areas, namely bias on the part of the Tribunal, a failure to give any or any adequate reasons for the finding of unfair dismissal, ignored evidence on the issue of reasonable adjustments, and lastly whether discrimination contrary to Section 5 (1) of the **Disability Discrimination Act 1995** was an issue before the Tribunal and, if so, whether they came to any or any adequate conclusions on that issue.

Bias

5. The issue of bias arises from two incidents in the course of the hearing. At the end of the first day's hearing, by which time the Tribunal had heard the Respondent's evidence, they gave a preliminary indication as to the merits of the case and also a possible level of compensation for injury to feelings. The note of the Chairman's indication taken by Mr Downs concludes in the following terms:
"Both sides should note that this is a provisional indication from which they can take stock and see whether this matter can be resolved amicably. We will keep an open mind. We hope this is helpful."

   The Tribunal had indicated that in their view, in the light of the parties' agreement that the duty to make reasonable adjustments had arisen between 24 September and 31 December 2001, that the employers had not taken proper steps between that time and that the employee had been "pushed into a corner to accept ill-health retirement". The Tribunal rejected the suggestion made by the Respondent's Counsel in opening that a figure of £8,000 was a suitable level of award for injury to feelings and had suggested an alternative in the band £3,000 - £5,000.

6. The second incident arose on the afternoon of the second day at approximately 3.10pm, when one of the lay members, Mr Kelly, embarked on a series of questions to Mr Probyn, one of the Respondent's managers, who had been giving evidence all day. It is contended by Mr Downs, and has not been disputed, that the questioning lasted for 35 minutes and only stopped after Mr Downs expressed concern that Mr Kelly was cross-examining the witness and about the amount of time that the questions took. Mr Downs again has prepared for us a note of the questioning which centred very much on the alleged failure of the Respondents to take any action and make adjustments in the light of the advice they had received from Dr Westlake. Mr Downs' note records that at one stage Mr Kelly's question became "aggressive".

7. Both the Chairman and the two lay members, as is our practice, have been given the opportunity to respond to these issues. The Chairman, Mr A Hossain QC, reminded us that on the first morning of the hearing the parties had asked for some time, as they wished to explore the possibility of resolving their differences without a full and contested hearing, and whilst these discussions were taking place the members had the opportunity to read through the Witness Statements and look at most of the relevant documents in the agreed bundle. Mr Harris told us that the Tribunal had also received detailed opening submissions from both Counsel. Mr Hossain continued that by the end of the first day the Respondent had given his evidence and was cross-examined at length and all issues in support of the Appellants' case had been explored with him, and he continued ***"…the Tribunal had a very good idea of the issues before it and could form a preliminary view of the strengths and weaknesses of the parties' respective cases."*** He continued as follows:

   "(6) Bearing in mind that the parties applied for time to negotiate in the morning and given the Tribunal's then understanding of the case, the Tribunal felt that it would be reasonable and proper and in the interests of the parties to give them a preliminary view of how the Tribunal was viewing the evidence, albeit that it had only heard evidence from the Applicant and had not heard the Respondent's witnesses.

   (7) Therefore I informed Counsel for the parties that some parties and their representatives benefited from such indications and if they thought that the indication given by the Tribunal was helpful they could act upon it or reject it as they wished. I then gave an indication of the Tribunal's views in the presence of the parties and their representatives. As I have not seen the note of the indication referred to in the Notice of Appeal, I cannot comment upon it. However, I made it clear that the indication was provisional only and that the Tribunal had not heard the entire evidence or final submissions. I also made it clear to the parties that if the parties could not resolve the matter between themselves the Tribunal would decide the matter after the hearing all the evidence and taking into account the submissions of the parties."

8. With regard the questions asked by Mr Kelly, Mr Hossain stated that it was his practice to give members an opportunity to ask questions of the witnesses at the end of cross-examination but before re-examination. His view was that Mr Kelly's questions were proper: ***"…advanced for the purpose of clarifying the evidence on the issues that the Tribunal had to identify. I do not accept that Mr. Kelly was being aggressive in asking those questions or that he was seeking to cross-examine Mr. Probyn. If***

he were, I would have intervened. The difficulty that Mr. Kelly was facing was that Mr. Probyn was not answering the question he was being asked and this naturally led Mr Kelly to rephrase his question and the approach to the issue from a slightly different angle."

He later went on to say that following Counsel's intervention he asked him whether he wished to make a formal complaint about it, but he did not make one. Mr Kelly himself confirmed that one of the reasons for the length of time taken was that: "***…in my view the reluctance of the witness to answer the questions put to him, although I accept that this was the view that I formed.***"

9. Mr Downs submitted that the preliminary indication was premature in circumstances in which reasonable adjustment was in issue and the Respondents had not yet called any evidence, coupled with the detailed nature of the indication in relation to both the Respondents' failure to make reasonable adjustments and the appropriate level of compensation. He argued that it could lead an impartial observer to form the view that the Tribunal had already made up its mind and that if the hearing did continue the Appellants would not get a fair hearing. He argued that that perception would have been increased by Mr Kelly's actions. He submitted that the questioning of the witness by Mr Kelly was excessive, was carried out in an aggressive tone and went beyond the duty of the members of the Tribunal to clarify issues and became adversarial cross-examination, such that again an impartial observer could perceive that by that stage in the proceedings certainly Mr Kelly had come to a formed opinion about the outcome of the case.

10. Both Mr Downs and Mr Harris referred us to **Jiminez v London Borough of Southwark** [2003] IRLR 477. In that case by the end of the tenth day of hearing all the evidence had been heard except one of the council's witness, and the Tribunal suggested that it might be appropriate to have meeting with counsel the following day so that the Tribunal could give its preliminary thoughts on the case, especially as to matters it would want counsel to address in their final submissions. At the meeting, the Tribunal expressed its preliminary views, including a view that the employers had treated Mr Jiminez "appallingly", that there were serious breaches of the unfair dismissal provisions and that, looking at the employers' conduct as a whole, they had fallen short of their obligations, and they encouraged the parties to enter into discussions with a view to settling the matter. The was no settlement and the hearing resumed and there was a finding that Mr Jiminez had been discriminated against on the ground of his disability and that he had been constructively unfairly dismissed. The EAT found that there was a real possibility of bias and allowed the appeal. This Decision was reversed by the Court of Appeal, who held that there was no apparent bias in the Employment Tribunal's statement of its preliminary views, including the view that the way that the employers had treated the employee was appalling, and its encouragement of the parties to enter into discussions with a view to settling the matter. It could not be accepted that that indicated that the Tribunal had formed a concluded view, hostile to the employers, before all the evidence and final submissions had been heard. Although the premature expression of a concluded view could amount to the appearance of bias, the Court of Appeal held that there was no reason why a strongly expressed view could not be a provisional view, leaving it open to the party criticized to persuade the Tribunal as to why that view was wrong and why the party's conduct was justified. However, the more trenchant the view the more the attachment of the label "preliminary" may need to scrutinized to see whether the view was truly preliminary and not a concluded view. At paragraph 39 Peter Gibson LJ said this:

> "***39 Accordingly, I would respectfully disagree with the conclusion of the EAT. This is not a case like the Simper case where concluded views were being expressed in unqualified form against the employer even before its case was opened and its evidence heard. On the contrary, in this case the bulk of the evidence had been heard and the tribunal would have been well aware of the impression made on them by that evidence. It was helpful to the parties to be given that indication of preliminary views so that the submissions yet to be prepared and, if thought fit, further evidence could be properly focused on the tribunal's concerns. In my judgment no apparent bias was shown.***
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> ***40 In conclusion I would add a word of caution for tribunals who choose to indicate their thinking before the hearing is concluded. As can be seen from this case, it is easy for this to be***

> ***misunderstood, particularly if the views are expressed trenchantly. It is always good practice to leave the parties in no doubt that such expressions of view are only provisional and that the tribunal remain open to persuasion. But for the reasons given I would allow the appeal, set aside the order of the EAT and restore the decision of the tribunal."***

Mr Downs seeks to rely upon this Decision in that whilst accepting in **Jiminez** the Chairman, in giving an indication, had used quite strident language, this was almost at the conclusion of the case when the Tribunal had opportunity of hearing the bulk of the evidence, as opposed to the situation in this case where, as he had already submitted, only the Respondent had given evidence. He also submitted that in view of the clear views being expressed by the Chairman and indeed by Mr Kelly on the following day, the use of the word "preliminary" did not provide sufficient justification for the action that the action that the Chairman and Mr Kelly had taken.

11. Mr Harris submitted that in relation to the Chairman's indication, the Tribunal when giving their views had read most of the relevant documentation in the case and were aware that the parties had already attempted to settle the claim. He submitted that the indication given by the Chairman was not particularly detailed, but obviously dealt with the main allegation, namely the employers' failure to make adjustments. In relation to the figure for damages, Mr Harris pointed out that he had already made submissions in his opening about the appropriate sum and therefore the Tribunal had in mind a figure and were not simply "plucking a figure out of the air". He also submitted that the Tribunal Chairman had not used the sort of trenchant language as had been used in Jinimez. As regards Mr Kelly's questioning, he submitted that the actions taken by Mr Kelly were justified in the light of Mr Probyn's failure to give straightforward answers and because he was the Appellants' main witness.

12. We accept the Respondent's submissions on this point and do not find that the Tribunal in their actions, either in relation to the statement of its preliminary views or the questioning of Mr Probyn, displayed apparent bias. With regard to the indication given by the Chairman, we are satisfied that it was quite clearly expressed as a preliminary view and that at the stage it was given the Tribunal had taken the opportunity of considering most of the papers in the case, including Witness Statements and the parties' submissions, and were well aware of the issues being raised, particularly in relation to the issue of reasonable adjustments. They were aware that the parties were already discussing settlement and had also heard evidence from the Respondent including, no doubt, matters put to him in the course of cross-examination, and the language used by the Chairman was in our view careful and measured and far less trenchant than that that had been used in the **Jiminez** case.

13. As regards Mr Kelly's questioning, we are somewhat concerned at the length of time that it took and the risks that that could lead to a view that at least one member of the Tribunal had already formed an opinion about the case. In our collective experience we have not known of a situation where a lay member has been allowed to ask so many questions and we are a little surprised that this experienced Chairman did not seek to curtail the questioning at an earlier stage. However, it is necessary for us to look at the reason and the substance of the questioning and from the summary that we have seen it is quite clear that firstly it was important to establish Mr Probyn's views in relation to the action that the employers considered taking in relation to the medical reports that they received and why more positive action was not taken, and we are satisfied that Mr Kelly's questions were directed towards a legitimate issue. It is also of significance in our view that it is not suggested that elsewhere within the case either Mr Kelly or any of the other members in the course of the evidence had displayed any partiality, and taken as a whole we are not satisfied that a reasonably informed observer would consider that there was a risk of bias arising from either the Chairman's intervention or Mr Kelly's actions.

Unfair Dismissal

14. The Tribunal's findings on this issue are brief and are contained in paragraph 41 of the Decision as follows: ***"On consideration of the minutes of the meeting of the 2 July and the letter of the 3 July2002 against the background of the events set out above, the Tribunal has no hesitation is concluding that Mr. Hafez was dismissed by EBC. The termination of the employment was not consensual at all. It***

was simply imposed upon Mr. Hafez by EBC. The reason for the dismissal was capability on the basis of ill health. In all the circumstances of the case, we also find that the dismissal was unfair."

These conclusions follow the earlier findings of fact in paragraph 26: "***On the 2 July 2002, Mr. Hafez met Alison Robins, the Employee Relations Adviser to discuss ill health retirement. He was informed that his employment was being ended that day on medical advice and that he would be paid 12 weeks' notice and his holiday pay. This was confirmed by letter dated the 3 July 2002. The effective date of termination was the 30 September 2002.***"

Mr Downs had originally submitted that the Tribunal's conclusions in relation to the termination of the employment being imposed rather than consensual ignored the substantial body of evidence that had been placed before the Tribunal by the Appellants in relation to the Respondent's application for ill-health retirement and the various meetings that had taken place. However, faced with the details of the minutes relating to the meeting of 2 July, it was readily apparent that whilst initially the Respondent may have been willing to consider ill-health retirement, by the time of the meeting that was clearly not an agreed position and it is clear from the minutes that the decision to dismiss was a unilateral decision taken on the part of the employers. In the circumstances Mr Downs sensibly did not pursue this matter. However, he went on to complain that the Tribunal did not indicate whether the dismissal was substantially or procedurally unfair, particularly since the Tribunal had found that by June there were two medical reports, one from Dr Westlake and one from Dr Simpson, both suggesting that the Respondent was either permanently incapable or unable to return to his normal employment. Mr Downs also submits that, insofar that it could be argued that the unfairness resulted from the continuing failure to make adjustments, there was no finding in relation to whether his medical condition would have continued had adjustments been made. Mr Downs reminded us that in **H J Heinz Company Ltd v Kenrick** [2000] IRLR 144 the EAT held that it would be an error of law for a Tribunal to proceed on the basis that a disability related dismissal, which is not justified under the **Disability Discrimination Act 1995** is, without more, automatically unfair under the **Employment Rights Act 1996**, and that separate consideration must be given to the question of unfairness. It seems to us that the Tribunal's findings in respect of unfair dismissal do not comply with the bare requirements set out in such cases as **Meek v City of Birmingham District Council** [1987] IRLR 250 so that the Appellants are able to know, on that issue, why they have won and why they have lost, particularly as we have stated in the light of the medical evidence accepted by the Tribunal from Dr Westlake and Dr Simpson.

Reasonable Adjustments

15. Section 5 of the **Disability Discrimination Act 1995** provides:

"***5. - (1) For the purposes of this Part, an employer discriminates against a disabled person if-***

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

(2) For the purposes of this Part, an employer also discriminates against a disabled person if-

(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and

(b) he cannot show that his failure to comply with that duty is justified.

(3) Subject to subsection (5), for the purposes of subsection (1) treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(4) For the purposes of subsection (2), failure to comply with a section 6 duty is justified if, but only if, the reason for the failure is both material to the circumstances of the particular case and substantial."

16. The Tribunal's conclusions on this issue were set out in paragraphs 42-44 of their Decision as follows:

"***42. In the light of the finding that the illness was caused by the treatment of his managers, it is clear that Mr. Hafez found himself in a situation where his earnings stopped, his ability to earn was impaired and his ability to return to work was impaired. These are substantial detriments suffered***

by Mr. Hafez on the grounds of his disability. We find that the company discriminated against Mr. Hafez and such discrimination related to his disability.

43. The obligation to make reasonable adjustments is admitted in this case. The problem was identified by Mr. Hafez and confirmed by Dr. Westlake to be his managers and line managers. There seems to be an issue as to whether it was Mr. Foden, Mr. Kemp or Mr. Probyn or a combination them. Therefore, it would have been sensible in the first place to discuss matters with Mr. Hafez to clear the air and to make reasonable adjustments to get him back to work. The reasonable adjustments could have included discussion about alterative reporting lines and the new ground rules. A phased return to work could also be discussed and implemented with shorter working hours / days and lesser work and responsibility initially. It seems to the Tribunal that after these initial discussions, it should have been proposed that Mr. Hafez's line management would be changed. As an alternative, Mr. Hafez could have been transferred to another position within the department and also outside it.

44. EBC did none of this but spent a long time trying to set up the initial meeting through mediation. The Tribunal concludes that EBC failed to make reasonable adjustments in respect of the matters complained of by Mr. Hafez. EBC has raised the defence of justification in respect of each of the matters complained of. We find such failures were unjustified."

Mr Downs complained that the Tribunal ignored the substantial amount of evidence presented to them relating to the council's attempts to establish mediation with the help of the union Unison and the difficulties they encountered in actually setting up a face to face meeting with the Respondent, coupled with the fact that from May 2002 onwards the parties were very much concerned with the possibility of an agreed ill-health retirement. Even the Tribunal in paragraph 43 appeared to accept the sense of initially discussing matters with the Respondent to "clear the air and make reasonable adjustments to get him back to work". We do not accept that the Tribunal did ignore the evidence that was placed before them, for in paragraphs 22-24 they set out a brief history of the events from late 2001 through to middle of 2002, and in paragraph 27 speak of the "above chronology of events clearly demonstrates that Mr. Hafez has been treated consistently badly by his employers". In their conclusions in paragraph 44 they make it clear that the Appellants neither formally suggested or made any adjustments and by inference clearly rejected the suggestion that, in trying to set up a mediation meeting, the employers were thereby fully discharging the duty that was placed upon them by Section 6 of the **Disability Discrimination Act** to make adjustments. Whilst the findings and the conclusions of the Tribunal are somewhat brief, we do not find that they are inadequate or perverse on this issue.

Discrimination Contrary to Section 5 (1)

17. Mr Downs contends that no claim under Section 5 (1) was ever pleaded by the Respondent and at all times the Appellants believed that they were facing a claim under Section 5 (2), and the further pleadings were on the assumption that it was a reasonable adjustment case. As late as the beginning of the case the Appellants filed a case summary in which it explicitly set out the assumption that it was a claim under unfair dismissal and failure to make adjustments, and it was only just before the case was opened that Mr Harris informed Mr Downs that the Respondent was also claiming discrimination under Section 5 (1). He contended it would have been necessary for the Respondent to have applied to amend if he wished to argue that claim – see **Skinner v Leisure Connection plc** (EAT 12 May 2004) UKEAT/0059/04. He argued that if it had been made clear that Section 5 (1) was an issue then he would have made submissions on the question of a justification. He placed before us his outline submissions, produced at the end of the Tribunal hearing, where he set out the issue in this way: ***"can it be said that a time arrived at that, as a result of the Respondent's failure to make reasonable adjustments the Applicant was no longer able to continue working".***

He further complains that even if it was an issue in the case, the Tribunal having identified it as an issue at the beginning of the case in the following terms "once the dismissal as a result of the disability", they failed to make findings on that issue in their conclusions, although the Tribunal made reference to their finding that the illness was caused by the treatment of his managers.

18. Mr Harris argued that reading paragraphs 9 and 10 of box 11 of the IT1 made it clear that disability discrimination was being put forward as an alternative to the claim for unfair dismissal, and therefore the manner of the dismissal and whether it was discriminatory had been thereby expressly raised. He argued that in any event the issue was clearly raised because of:

    (1) The dismissal was said to be on the grounds of ill-health, and the ill-health was the disability.

    (2) The Respondent always contended that the dismissal would have been unnecessary if reasonable adjustments had been made, and therefore if the employer was in breach of their Section 6 duty, and that failure has led to the employee's dismissal, then discrimination under Section 5 (1) must be an issue.

    His substantial point is that discrimination under Section 5 (1) was agreed as an issue at the start of the proceedings and is recorded as such by the Tribunal. He argued that no pleading point was taken by the Appellants at the beginning of the hearing, if so the Tribunal could have heard argument and an application by the Respondent to amend the Originating Application if necessary. He contended that it was open to the Appellants to raise justification in the hearing but they failed to do so. In any event he argued that they would have had great difficult in so doing in the light of Section 5 (5) of the **Disability Discrimination Act 1995**, which provides that: *"**If, in a case falling within subsection (1), the employer is under a section 6 duty in relation to the disabled person but fails without justification to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with the section 6 duty.**"*

    In other words, the Appellants would have had to satisfy the Tribunal that the action of dismissal would have been justified even if they had complied with their duty to make reasonable adjustments.

19. We are quite satisfied that discrimination under Section 5 (1) was an issue before the Tribunal. It had been raised in the pleadings and was raised by Counsel at the outset and, most importantly according to the Tribunal, was an agreed issue before them. The problem, however, that we face is that they have not made clear and direct findings under Section 5 (1) other than a finding that his illness was caused by the treatment of his managers which, as Mr Harris conceded, was a collateral issue and not relevant to discrimination under Section 5 (1).

20. Accordingly we propose to remit the matter back to the same Tribunal for a rehearing on the issues of unfair dismissal and discrimination under Section 5 (1). We do not anticipate that they will need a complete fresh hearing, but rather to make further findings and conclusions, possibly after receiving further written submissions from the parties. The finding in relation to discrimination under Section 5 (2) will remain.