THE HIGH COURT

[2023] IEHC 225

Record No. 2022/535 JR

BETWEEN

AMMI BURKE

APPLICANT

AND

ADJUDICATION OFFICER

AND

WORKPLACE RELATIONS COMMISSION

RESPONDENTS

AND

ARTHUR COX

NOTICE PARTY

Judgement of Ms Justice Marguerite Bolger dated 3rd day of May 2023

1. In July 2022 I was the judge assigned to hear the applicant's application for leave to bring judicial review proceedings against the respondent arising from the manner in which her claim of unfair dismissal against the notice party was treated and ultimately dismissed by a Workplace Adjudication Officer. The applicant did not express any concern at that time about me hearing her application. I granted her leave to pursue all the reliefs listed by her in her Notice of Motion. The substantive judicial review was listed before me for hearing on 2 May 2023. When it came to the Applicant's attention on 28 April 2023 last that I had been

assigned to hear her case, she asserted that I should recuse myself. I heard her recusal application on 2 May 2023.

2. The applicant asserts the existence of objective bias on four grounds:

i. An article I wrote in 2015 which the applicant says expressed views equating to a decision on one of the issues she has raised in her judicial review.

ii. A close relationship the applicant says I have had over many years with the Senior Counsel for the notice party arising from our both having been founder members of a specialist bar association and having presented papers at the association's annual conference.

iii. Views I expressed during the leave application that this case is not a case of public interest.

iv. The notice party's inclusion of my name as a proposed mediator in August 2020 without discussion with me.

The Test for Objective Bias

3. The well-established test for objective bias is (as confirmed by Fennelly J in *O'Callaghan v. Mahon* [2007] IESC 17, [2008] 2 I.R. 514. in a dicta frequently followed since) if a reasonable and fair-minded objective observer who is not unduly sensitive but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial.

4. The Supreme Court has repeatedly referred to the declaration made by a judge on their appointment in accordance with Article 34.6.1 of the Constitution which is as follows;

> "In the presence of Almighty God I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me."

5. The Supreme Court has also confirmed a judge's duty to hear a case assigned to them; in particular in the decision of Denham J. in *Bula Ltd. v. Tara Mines Ltd.* (No. 6) [2000] 4 I.R. 412:

> "A judge has a duty to sit and hear a case. However, in certain circum-stances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective." (at 449)

6. In *Kelly v Minister for Agriculture* [2021] IESC 23, [2021] 2 I.R. 624, the Supreme Court gave some direction on assembling the facts of which the reasonable and objective observer would have to be aware. There, it was held that the appropriate test for objective bias was whether a reasonable person in the circumstances would have a reasonable apprehension that an applicant would not have a fair hearing from an impartial judge on the issues, and that in considering whether or not objective bias was established, a useful approach was to list all the facts that would be known to the hypothetical, reasonable, independent observer.

7. I consider that a reasonable and objective observer would be deemed to be aware and understand the following facts in this case,

i. The distinction that exists between a barrister comment's in an academic journal as versus the judicial function to make a decision based on the law and on precedent.

ii. The likelihood of a judge having engaged in legal commentary in publications and papers during their time as a practitioner.

iii. The nature of a barrister's professional relationships with their colleagues within a specialised bar and in establishing and/or running a specialist bar association.

iv. The expectation that a judge would maintain contact with the world of legal education after their appointment as a judge.

v. The difference in an application for leave as versus the substantive application in judicial review and the context of comments made during an application for leave.

vi. The court's refusal at the leave application to allow the applicant to amend her pleadings to seek a relief akin to an advisory opinion.

vii. The applicant's conduct during the application for leave in repeatedly challenging the court's decisions.

viii. The nature and practice of mediation.

ix. The lack of involvement of a practising barrister nominated as a potential mediator with whom there was no discussion by either of the parties and who was not ultimately appointed as mediator.

Judicial Council Guidelines

8. I have had regard to the Judicial Council's Guidelines for the Judiciary on Conduct and Ethics, adopted by the Judicial Council with effect from 1 June 2022, which are underpinned by the UN Bangalore Principles of Judicial Conduct of 2002. I consider the following to be particularly relevant;

> "2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
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> 2.5 A judge shall recuse himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where
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> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
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> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that recusal of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

2.6 A judge who is requested by a party to recuse himself or herself, or who apprehends that there may be grounds for recusal, other than those grounds set out above, shall consider such issue dispassionately and without undue sensitivity. The proviso that recusal is not required if no other tribunal can be constituted or because of urgent circumstances continues to apply.

2.6.1 It is the duty of a judge to sit and hear cases.

2.6.2 A judge should recuse himself or herself if a reasonably objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. The reasonableness of such an apprehension must be assessed in the light of the constitutional declaration made by judges on taking up office, and their ability to fulfil that declaration by reason of their training and experience. It must be assumed that they can clear their mind of irrelevant personal beliefs.

2.6.3 If a request for recusal is grounded upon an assertion of objective bias, the judge should remember that such a ground does not imply personal criticism but is concerned with the perception of partiality in the eyes of a reasonably objective and informed observer.

2.6.4 Objective bias is not to be inferred merely from the fact that a judge has made interim or interlocutory orders in the proceedings, or has presided over a trial that did not come to a final verdict, or may have made legal errors in that process.

2.6.5 Objective bias may be established by showing that the judge has acted in such a manner as to give rise to a reasonable apprehension that he or she will decide the case without proper consideration of the evidence and submissions.

…

4.11 Subject to the proper performance of judicial duties, a judge may:

> 4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;"

Decision

9. I do not consider that a reasonable bystander informed of the relevant facts, as set out above, would conclude that I cannot hear this case objectively and impartially. I address below my decision in relation to each of the four grounds on which the applicant has asserted objective bias.

i) 2015 article

10. I wrote an article in 2015 when I was a practising barrister in which I expressed my concern about aspects of the then Workplace Relations Commission Bill and in particular its failure to allow for cross examination on oath. The applicant describes a statement therein about the adversarial versus inquisitorial nature of proceedings before the WRC for which she says I wrongly asserted support from a decision of the European Court of Human Rights as follow: *"It's a forceful, trenchant statement of your views on the core issue of this case which means that the case is already decided"*. She submits that this shows my pre-determination of an issue she has raised in these proceedings challenging the entitlement of the Workplace Adjudication Officer to hold that unfair dismissal proceedings are essentially adversarial. The applicant relies on a decision of the UK Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) in which the Court of Appeal found objective bias in the "*tone and trenchant views*" expressed by the writings of the judge who decided the case. The publication in question was written by the judge while he was a judge and close in time to the decision which the Court of Appeal found he should have recused himself from. There is a significant difference between a practitioner writing a commentary on draft legislation and a judge writing extra judicially. The UK Court of Appeal correctly held in *Locabail* that a judge may need to be careful in how they express their views. No comparable obligation is imposed on a barrister commenting in a journal article on draft legislation.

11. The views I expressed as a practising barrister in 2015 some six years before I was appointed as a judge which touched on the adversarial versus inquisitorial nature of the WRC

did not "*decide"* the issues to be determined here, as the applicant has claimed. I expressed a concern related primarily to the failure of the draft legislation to allow for cross examination on oath before the WRC, a concern shared by many legal commentators at that time and subsequently vindicated by the decision of the Supreme Court in *Zalewski v. Work Place Relations Commission* [2021] IESC 24, [2022] 1 I.R. 421.

12. There is no reasonable basis for the applicant's stated concerns that the contents of that article indicates that I have made a decision on the issues she has raised. Any such concern she may have demonstrates her misunderstanding of the role of legal commentary by practitioners as versus the judicial function to listen to a case and make a decision in accordance with the law and binding precedent. A reasonable, objective and informed by-stander would not share the applicant's misunderstanding or her view that the article constitutes a decision in this case. This is particularly so given that one of the reliefs on which I granted leave, on the basis that I was satisfied the applicant had established an arguable case, is a declaration by way of judicial review that the Adjudication Officer's ruling that proceedings in the adjudication of unfair dismissal claims at the Workplace Relations Commission are adversarial or essentially adversarial is unfair, incorrect and contrary to law, the very point which the applicant claims the article evidences my having already decided the issue against her.

13. Aside from the content of the article, it was not written by a judge and therefore falls be assessed differently to the standards to be applied to a judge writing, as was the case in *Locabail*. Judges do not and should not live in ivory towers. They are appointed because of their previous experience, which may include having made comments in publications, papers and participation at conferences or similar type events. The fact that those type of comments were made by a judge while they were in practice does not render them incapable of impartially hearing and determining a case on the same or a related point as the area on which they commented prior to their appointment.

ii) Relationship with the notice party's counsel

14. The applicant claims that what she describes as a 'close relationship' has existed over many years between me and the senior counsel for the notice party, Peter Ward SC. She bases this on the fact that we were both founding members of the Employment Bar Association some years ago and that we shared the stage as speakers at the association's annual conference on a number of occasions while I was a practising barrister. The applicant also relies on my chairing of a session of the association's conference in 2022 in my judicial capacity, although she did not identify any particular involvement that Mr Ward SC had with that event. She does not suggest that the notice party had any involvement in the association or the conferences or that I had any particular relationship with the notice party. I therefore take her submission to be that an objective by-stander informed of the relevant facts, would have a reasonable concern about my ability to impartially and objectively hear any case in which Mr Ward SC is instructed as counsel due to our involvement some years ago in founding a specialist bar association and subsequent joint involvement in the association's conferences.

15. The Judicial Council guidelines confirms a 4.11.1 that a judge may "write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters" The Supreme Court has also confirmed in *O'Driscoll v Hurley and Health Service Executive* [2016] IESC 32 that "The practice of law necessarily involves openness to the concept of lifelong learning" and further that "The exchange of views and ideas made possible at such gatherings is of immense value to concerned" (p 18-19).

16. The fact of a previous joint involvement by a judge when they were in practice and a barrister with a specialist bar association, along with any involvement they may have with such with such an association as a judge, is a normal part both of practice and of being a judge. I find support for that in the decision of the Supreme Court in *O'Driscoll*. Such involvement does not indicate objective bias and would not be viewed as such by an objective bystander informed of the relevant facts. My view in that regard is fortified by the very recent decision of the Court of Appeal in *O'Doherty and Waters. v. The Minister for Health and Ors* [2021] IECA 59, where the applicant claimed a perception of bias arising from the fact that the judge who had refused their application for leave, had been involved some

twelve years previously as a practising barrister in putting together a consortium with the barrister who was instructed as the respondent's senior counsel. A consortium involves an even more engaged relationship that what the applicant claims gives rise to a perception of bias in this case, with commercial ties and joint engagement in remunerative work that are not part of any barrister's involvement with a specialist bar association, whether as a founder, a member and/or an active participant. The Court of Appeal in *O'Doherty* stated the following:

> "45. A new issue was raised by the applicants on the eve of the appeal hearing. They raise an issue of objective bias. They do so, having become aware of the fact that Patrick McCann SC and Charles Meenan SC (as he then was) were members of a team providing legal services to a public inquiry into the banking crisis of 2008. Mr. McCann SC was counsel for the State respondents in the High Court, while Mr. Justice Meenan was the judge before whom the application for leave to seek judicial review came on for hearing. In 2014, the Houses of the Oireachtas published a tender seeking a team of suitably qualified legal practitioners. The applicants say that the fact of the tender process, which brought together a number of barristers to form a team, differentiates their situation from the normal one of barristers briefed as individuals by an instructing solicitor and brought together as individuals. They contend that their concern is heightened by the fact that the High Court judge displayed a degree of disdain, aggression and hostility to the applicants. They contend that there was a grave danger that an objective person observing the proceedings, and becoming aware of the background, might well form the view that the Court did not have its mind open to persuasion by the evidence and the submission of the applicants. The applicants' submissions make reference to cases such as *Bula v. Tara Mines (No. 6)* [2000] 4 IR 412 and *Kenny v. TCD* [2008] IESC 18.
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> 46. The applicants acknowledge that the nature of the barristers' profession is that members of the Bar find themselves involved in cases with and against colleagues and recognise that if one of the barristers then becomes a judge, the fact of having acted with or against a practitioner appearing before him or her does not present a difficulty. However, the applicants say the fact that Mr. Justice Meenan and Mr. McCann were among a group of barristers, who came together as a team to tender with a view to providing services to the Houses of the Oireachtas, takes the situation out of the ordinary. The respondents say that the involvement in a banking inquiry together several years ago could not conceivably come near the level of reasonable apprehension of bias. It must be noted that the reasonable bystander from whose

> perspective the matter is judged, is just that; a reasonable bystander, not a devotee of conspiracy theories. I cannot believe that any reasonable bystander would be concerned. On the contrary, I believe that a reasonable bystander would view any suggestion of there being a basis for concern as fanciful. So far as the applicants now seek to draw support for their concerns from the judge's conduct and demeanour during the trial, such criticisms formed no part of the appeal and do not impress. Indeed, I am bound to say that the raising of this issue at this stage and in this manner smacks of desperation"

iii) Statements made during the leave application

17. The applicant says I expressed views during her leave application which I heard on 25 July 2022 and a further application made by her on 28 July 2022 that her case is not a public interest case and that this establishes objective bias. The applicant describes my comments as *"a false statement".* My comments were in relation to my refusal of her application to amend her pleadings to seek relief involving the High Court in clarifying the practical application of particular sections of the Unfair Dismissals Acts. I made those comments at the time I granted leave to the applicant to seek all of the relief on all of the grounds set out by her in her pleadings, thereby confirming my view that she had an arguable case in relation to each of those reliefs on those grounds.

18. My comments were made in the context of, and seeking to explain, my refusal of the applicant's request made during the leave application to amend her proceedings to seek leave to seek declaratory relief equating to what I considered was a request for an advisory opinion from the High Court, a relief that is simply not available. A refusal of an application by a judge and comments made in formulating that refusal does not, of itself, indicate objective bias.

19. The Judicial Council Guidelines confirm at paragraph 2.6.4 that "2.6.4 Objective bias is not to be inferred merely from the fact that a judge has made interim or interlocutory orders in the proceedings, or has presided over a trial that did not come to a final verdict, or may have made legal errors in that process." This point has also been confirmed by the High Court in *D.D. v Gibbons* [2006] IEHC 33 [2006] 3 I.R. 17. The applicant seeks to distinguish my comments, described by her as "*a false statement"* from the adverse findings

referred to in the caselaw. I did not find her attempts to distinguish what occurred at the leave stage from the interlocutory decisions referred to in the Guidelines and the caselaw to be convincing.

20. I did point out during the leave application that the applicant remained entitled to explore the interpretation of the legislation at the substantive hearing. Insofar as confirmation is needed, that remains the position, as does the applicant's right to seek to rely on whatever points she raises or establishes in any application for costs that may be made at the end of the substantive hearing. Perhaps that may be of some reassurance to the applicant, even at this stage. I also confirmed to the applicant that she was entitled to appeal my decision to the Court of Appeal. The applicant contended that where a judge makes a statement that the applicant asserts was wrong, that the applicant was entitled to continue to challenge that decision and to refuse to accept it and move on with the proceedings. The applicant justified this approach by making the argument that I did "*not have a right to be wrong*". The applicant, in effect, claims that where a litigant disagrees with a judge's decision they are entitled to repeatedly challenge that decision before that judge rather than invoke any right to appeal they may have. The applicant's arguments demonstrate an extraordinary lack of understanding of court procedure and the status of a decision of a court that I do not believe would be shared by a reasonable, objective by-stander informed of the relevant facts.

21. An objective bystander informed of the relevant facts, including the applicant's conduct during the leave application, would not be concerned that a judge who made the comments that I did at the leave application, would be incapable of an objective and impartial hearing of the substantive case.

iv) Nomination as mediator

22. In the course of her oral submissions to this court on 2 May 2023, the applicant raised for the first time her concern about a letter of 26 August 2020 in which the notice party nominated me as the first listed of three potential mediators to mediate the underlying dispute between the applicant and the notice party. This letter was written at a time when

I was a practising barrister and an accredited mediator and when both parties seem to have agreed to go to mediation. Mr Peter Ward SC was the second person proposed and Ms Eileen Barrington SC was the third. The applicant also sought to rely on an email she received on 27 August 2020, the day after the letter, in which her solicitor confirmed that Mr Ward SC was available to do the mediation on 7 September 2020. For whatever reason, that mediation did not take place.

23. The applicant has been aware of the letter and related email since receiving them in August 2020, although she did say during her recusal application that she had only been reminded of it on the morning of her application. The issue was not identified by her as a concern when I heard her leave application in July 2022 and she did not include it in the comprehensive affidavit she prepared for the hearing on 2 May 2023 after she had been informed on 28 April 2023 that I had been assigned to hear her case.

24. The applicant sought to rely on the speed with which her then solicitor confirmed Mr Ward SC's availability to support her suspicion that discussions would take place with any proposed mediator before their name is put on a list. She stated that "*It would appear that before proposing those three mediators, [the notice party] had gotten the permission of the mediators to include their names".* I take this to mean that she claims that a conversation must have taken place between me and the notice party's solicitor before I could have been nominated by them. For reasons best known to the applicant, at no time has she asked the notice party's solicitor whether any such conversation did take place. The notice party's solicitor has confirmed to the court that no such conversation did take place in an affidavit that I gave leave to them to file after I had been informed by their counsel that no such conversation took place. The applicant confirmed to me that she did not wish to reply to that affidavit.

25. In spite of the late clarification of a point raised by the applicant for the first time while on her feet making her application for me to recuse myself, she chose to continue with this point even after that important clarification was provided by the notice party through their solicitor and counsel. It is clearly inappropriate that a litigant would seek to assert

objective bias by reference to a conversation that she says common sense would indicate had taken place with the judge against whom she asserts objective bias, without making any attempt to ask either of the parties to that alleged conversation (i.e. her former solicitor and the solicitor for the notice party) whether it did in fact occur. The applicant expressed surprise that she would have made such an enquiry of the notice party's solicitor in a contested matter. The court is surprised at her surprise that such a basic feature of attending to one's necessary proofs would not have been attended to in the same way as many potentially contentious issues can and should be narrowed between parties to litigation before an issue is put before the court. That expectation that an applicant would attend to their proofs before moving their application must be even more heightened where a litigant, who is also a qualified solicitor and officer of the court, would seek to rely on an assertion that a conversation must have taken place with the judge, without taking steps that were available to her to seek to establish whether any such conversation did in fact take place. The nature of litigation is that issues are contested and that cannot excuse the applicant from not making any attempt to establish the veracity of her suspicions before seeking to rely on them in her application to this court.

26. There is no basis to the applicant's contention that the proposal of a practising barrister to mediate a dispute that ultimately came before that person in their subsequent capacity as a judge, or a speedy email from one of the party's own solicitor confirming the availability of another person proposed, to act as mediator, could give a reasonable, objective by-stander, informed of the relevant facts, a concern about that judge's impartiality in hearing the case. Part of the facts with which the objective bystander would be deemed to be informed is the common practice to propose a number of mediators where there is a proposal to go to mediation, only one of whom will be appointed. Informed of those facts, a reasonable, objective bystander would not be concerned that such a judge could not hear the case objectively or impartially.

Conclusion

27. For the reasons set out above I am refusing the applicant's request that I should recuse myself from this hearing. I will now proceed to hear the substantive application. I will hear the parties in relation to the costs of this application at the end of the substantive hearing.