Are employment judges biased against claimants?

The answer you will get depends on who and how you ask. The Tribunal sends the parties feedback questionnaires; their answers are collated in a periodic Survey of Employment Tribunal Applications. The majority of claimants say that they received a fair hearing. Satisfaction levels are similar among claimants and respondents.

There have been qualitative studies of claimants, in which they are asked to do more than merely tick a series of boxes. In these studies, a substantial minority of Tribunal claimants complain that their Judge was hostile to them from the start of the hearing. This sort of detailed empirical study is usually only carried out among discrimination claimants. Their complaints are perhaps unsurprising; claimants in discrimination cases fare noticeably worse at full merits hearings than their counterparts in other types of employment claims.

In the 1970s and 1980s, a number of academics suggested Tribunals were subject to institutional pressures which favoured respondents. Few academics consider the question today.

A book published in 1983 described the experience of one Asian claimant who asked for an adjournment after being ambushed by his employer at the final hearing of the claim with reasons for his dismissal which had never been put to him previously. The Employment Tribunal Judge awarded costs against the Claimant. The EAT overturned the costs awarded on appeal but not without criticising the Judge for seeking the adjournment. Sir Ralph Kilner Brown suggested that the claimant’s inability to meet a case he had not expected was ‘somewhat typical of the oriental mind’.

Michael Rubinstein, who has been reporting industrial law cases since the Tribunal took on the unfair dismissal jurisdiction 40 years ago, has written that the calibre of judges has improved dramatically in that time, as has their understanding of discrimination law in particular.

Bias appeals are rare. They are fact-sensitive; they follow the general principles of the common law, that a fair trial is impossible when there is actual or even mere apparent bias. To give two examples:

Where a Judge expressed a view of the merits of a case, after the evidence but before closing submissions that was not apparent bias. Apparent bias was made out however where a Judge had been refused employment with a particular solicitors’ practice, and on failing to be appointed, intervened in his next case firmly against a client represented by the same firm.

The above cases are relatively old; there have been very few reported bias appeals in the past decade.

A reason for their absence is that the EAT rules discourage bias appeals. There is a specific procedure for such appeals, additional documents may have to be filed, and permission to appeal is less likely to be granted save after a preliminary hearing.

Paragraph 11.6.2 of the Practice Direction records that ‘The EAT recognises that employment Judges and Employment Tribunals are themselves obliged to observe the overriding objective and are given wide powers and duties of case management so appeals in respect of the conduct of Employment Tribunals, which is in exercise of wide powers and duties, are the less likely to succeed.’

Paragraph 11.6.3 of the Practice Direction continues: ‘Unsuccessful pursuit of an allegation of bias or improper conduct, particularly in respect of case management decisions, may put the party raising it at risk of an order for costs.’

While the rules discourage bias appeals it is clear that bias is an issue in a large number of unreported cases.

One case in the news this summer for example concerned a worker who had the misfortune to sue a celebrity businessman. The case against the businessman was struck out at an interim hearing on the basis, in part, of criticisms of the way the worker had pleaded the case, and in part on the basis of factual findings in a case where there was neither oral nor written evidence before the Employment Judge.

The Judge went on to make a costs award in favour of the celebrity, suggesting that the claimant could reasonably be expected to pay amongst other things the full fees of the counsel who had represented the celebrity, which were £1,000 per hour. One hour of the celebrity’s barrister’s time was equivalent to three weeks of the claimant’s gross monthly salary. This was a striking decision, in what is usually a costs-free jurisdiction.

The case against the businessman being struck out, there remained a live case against the employing company which the businessman was to close down in any event shortly after the hearing.

The Judge, being criticised for their interim decisions, agreed to take no further part in the case. After the hearing however the Judge declined to record this recusal in their note of the judgment; and then when challenged about this omission, issued a further judgment in which the Judge denied using the very words which, the claimant’s representatives complained, the Judge had spoken in recusing himself.

An appeal was issued. The Respondent however agreed not to enforce the costs order, making the appeal academic. The appeal was ultimately withdrawn and will therefore never be reported. What cases such as this one make clear however is that, despite the relative absence of reported cases, bias remains a live issue in Tribunal proceedings.

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