[2013 UKUT 0481 (TCC)
Appeal number: FTC/60/2012

Proceeding in the absence of the appellant – appellant providing medical certificate not complying with tribunal's directions – appellant wishing to delay hearing pending complaints procedure –whether decision of tribunal to go ahead perverse – whether account taken of irrelevant matters.
Bias – Porter v MacGill - whether decision of tribunal was such as to give rise to a real possibility of bias by reason of extensive reference to a decision which had been set aside.
Decision of FTT set side.

PHILIP JOHN WRIGHT **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
JUDGE JILL GORT

Sitting in public at 45 Bedford Square WC1B on 6 June 2013

Thomas Chacko of counsel, instructed by Martin Wright & Co for Mr Wright

Akash Nawbatt of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against the decision of the FTT (Judge Walters and Julian Stafford) released on 13 December 2011 in which, after a hearing in the absence of Mr Wright, it dismissed Mr Wright's appeal holding that workers engaged by Mr Wright between 1999 and 2004 had been employees.

2. The appeal is brought on two grounds. First, that the FTT was perverse (in the sense of [25] below) in deciding to proceed with the appeal in the absence of Mr Wright; and second, that the decision of the FTT was vitiated by apparent bias.

3. Mr Philip Wright, had been represented at various times in the course of the history of this matter by Martin Wright, a Chartered Accountant, who was not a relation. To avoid confusion we have referred throughout to Philip Wright as 'Mr Wright', and his accountant as Martin Wright.

A Brief History

4. The events which were the subject of its substantive decision took place between 7 and 12 years before the hearing before the FTT. The appeal has a long and complex history which is set out in detail in [1] to [71] of the FTT's decision. The framework is this:

(1) Mr Wright's appeal was heard and allowed by the General Commissioners in 2005;

(2) HMRC appealed to the High Court. In 2007 Lewison J allowed their appeal and remitted the case to the General Commissioners;

(3) the clerk to the General Commissioners transferred the proceedings to the Special Commissioners;

(4) in 2009 Mr Nowlan, sitting as a Special Commissioner, heard the appeal in the absence of Mr Wright and dismissed it;

(5) in August 2009 Judge Wallace set aside Mr Nowlan's decision;

(6) on 4 and 5 August 2011 the hearing which is the subject of this appeal took place in Colchester before Judge Walters and Julian Stafford in the absence of Mr Wright; and

(7) the FTT promulgated its decision on 13 December 2012. In that decision it made frequent reference to Mr Nowlan's decision

5. Mr Wright was aggrieved by the decision to transfer the appeal to the Special Commissioners and had, for some time before the 4 August hearing, been pursuing

extra judicial complaints in respect of it against both the Clerk to the General Commissioners and HMRC.

6. After Judge Wallace had acceded to the set aside application, directions and further directions were made for the service of summaries of witness evidence and for better particulars of Mr Wright's case. Extensions of time were granted.

7. After these exchanges the tribunal set 26 and 27 July 2010 for a hearing; it was postponed at Mr Wright's request. The tribunal next set 16 and 17 December 2010 for a hearing; that was postponed at HMRC's request. On 19 February 2011 the tribunal wrote to the parties asking for dates to avoid for a hearing; Martin Wright wrote in reply (in terms reflecting, and reflected in, other communications with the tribunal) "until [the investigation of the complaints] is completed [Mr Wright] will not be attending any hearings". On 4 June 2011 the tribunal gave notice to the parties of 4 August 2011 for the hearing.

8. That hearing of 4 August 2011 is the hearing which gave rise to the decision against which this appeal is made.

The Decision to proceed

9. On 14 June 2011, 10 days after the tribunal had given notice for the 4 August hearing, Martin Wright wrote to the tribunal seeking an adjournment. The letter raised questions of procedure and the complaints Mr Wright was pursuing against the Clerk to the Commissioners and HMRC. It requested an adjournment until these complaints had been resolved. In the last paragraph Martin Wright "also" noted that Mr Wright was ill, that a note would come from his GP to that effect, and "also request[ed] an adjournment as [Mr Wright] is unfit to attend a hearing."

10. A medical certificate dated 13 July was sent to the tribunal but it was unsigned. It said that Mr Wright was incapacitated by depression and would be unfit to attend the tribunal on the hearing dates. On 20 July 2011 Judge Walters made a direction (the "Unless Direction") that "UNLESS" a signed certificate giving further details of Mr Wright's incapacity and indicating when he would be fit to attend was received, the 4 August 2011 hearing would go ahead.

11. On 2 August 2011, two days before the hearing, the tribunal received a signed version of the medical certificate of 13 July – it was the earlier one but with a signature (carrying therefore no evidence of prognosis). On the same day the tribunal received an email from Martin Wright setting out an account of what Mr Wright had done after receiving the Unless Direction (we deal with that email in more detail at paragraph[28] below). Judge Walters then directed that the hearing go ahead.

12. On 3 August Martin Wright wrote explaining that Mr Wright had serious mental health issues which prevented his attendance, that he could not afford professional fees (Martin Wright was acting pro bono), and that the extra judicial complaints were still being pursued.

13. The FTT decided to proceed on 4 August 2011 despite the absence of Mr Wright or any representative on his behalf, and despite the application of 14 June 2011 for an adjournment (effectively repeated on the day before the hearing in Martin Wright's email of 3 August). At the hearing the FTT reserved its decision on the question of whether to adjourn and went on provisionally to hear and consider the evidence and Mr Nawbatt's submissions. Later on it released a decision which announced its conclusion that the right course to have adopted was to proceed with the hearing, and also set out its decision on the substantive appeal.

14. The FTT gave five pages of consideration to its decision to proceed. At [86] it accepted the following submissions from Mr Nawbatt as to why it was in the interests of justice not to make an open ended adjournment (which Mr Nawbatt said would have been the effect of Mr Wright's application):

(1) the matter had been going on for 12 years;

(2) there had already been "numerous attempts to hear the appeal";

(3) at least one hearing had been vacated by reason of Mr Wright's unavailability;

(4) Mr Wright had not complied with the Unless Direction;

(5) Mr Wright had not said why Martin Wright, who had been professionally involved for many years, could not have attended with Mr Wright's witnesses;

(6) the tribunal had received written summaries of those witnesses' evidence and that of Mr Wright;

(7) Mr Wright's main grievance was expressed in his procedural complaints against the Clerk to the General Commissioners and HMRC. He had said that he would not attend a hearing until they were resolved. That was quite separate from this appeal and so irrelevant to the question of whether to proceed;

(8) HMRC's witnesses were attending the appeal for the second time. It was more difficult to give reliable evidence as time passed.

15. Then the FTT said:

> "86. In reaching this decision the Tribunal accepts all the submissions made by Mr. Nawbatt and summarised above. However the fact that we have provisionally continued to hear the substantive appeal has been helpful in setting the context for considering those submissions. The question of the status of workers for tax purposes is highly fact-sensitive and we have been conscious of the poor quality of the evidence before us in considering it. It would have been very helpful to us to have had submissions addressed to us on behalf of Mr Wright and to have heard oral evidence from him and his witnesses and, perhaps, to have received further documentary evidence. Although this is a factor which would normally weigh in favour of granting a further adjournment, we have

concluded that Mr Wright is responsible for the poor quality of the evidence and this factor cannot on its own outweigh the relevant factors which suggest that we should not grant a further adjournment.

> 87. The main consideration which was put to us as suggesting that it would be unfair and unjust to proceed to hear the appeal was that Mr Wright had requested a further adjournment on health grounds. Normally the Tribunal would grant an adjournment on these grounds. But the Tribunal has concluded that it should not follow its normal practice in this case. This is because, first, there have been very considerable delays in bringing the proceedings to the point of trial (as outlined above). This, by itself, would not have been enough to persuade the Tribunal not to follow its normal course and grant an adjournment on health grounds. However, despite the Tribunal's request that he should do so, Mr Wright has failed to provide any medical opinion as to when he might be fit to attend a hearing of the appeal. This raises a real prospect of indefinite adjournments and an infinitely postponed disposition of the appeal, which the Tribunal considers would clearly not be in the interests of justice. The public interest in the finality of litigation must at some point prevail over conflicting interests and in the Tribunal's judgement that stage has now been reached."

16. After referring to the decision of the Special Commissioner in *Khan* v *Director of the Assets Recovery Agency*, and to *Rose v Humbles* 48 TC 103, from which it concluded (1) that article 6 of the Human Rights Convention did not assist Mr Wright, and (2) that Mr Wright's inability to attend to give evidence did not justify the tribunal in setting aside the assessments with the result that the tribunal could continue to hear the appeal notwithstanding Mr Wright's ill health, the FTT continued, at [95]:

> "95. Hitherto, we have proceeded on the basis that Mr Wright's claim to be prevented by ill-health from attending the appeal is genuine. The "Private Medical Certificate" is evidence that it is. However, the Tribunal notes that in his email to the Tribunal Centre of 3 August 2011 (the day before the hearing), Mr. Martin Wright said that "we [that is, presumably, Mr Wright and he] will, within the next month, be progressing our [Mr Wright's and his] complaint against the clerk to Colchester General Commissioners with the Legal Ombudsman. Following the response from HMRC to our complaints against that organisation we [that is, presumably, Mr Wright and he] shall be taking those complaints to the Adjudicator (again within the next month)." This suggests that Mr Wright's health does not prevent him pursuing his complaints against the former Clerk to the General Commissioners and HMRC, which we infer from the history of the matter related at length above, are the disputes that

> Mr Wright and Mr. Martin Wright are most interested in pursuing. *We do not dismiss the possibility that Mr Wright's claim to be unable to attend the hearing of the appeal on health grounds is a filibustering tactic intended to postpone the appeal indefinitely and on a par with his stated refusal to attend any hearing of the appeal until the other disputes are resolved*."[added italics]

17. It then concluded:

> "[96] After balancing the factors weighing in favour of and against granting a further adjournment *and for the reasons indicated above,* the tribunal has finally decided to continue to hear the appeal in the absence of Mr Wright…"[our italics]

18. Thus it was not only the factors mentioned in the submissions of Mr Nawbatt which the FTT took into account but also "the possibility that Mr Wright's claim…is a filibustering tactic intended to postpone the appeal …until the other disputes are resolved."

Mr Chacko's submissions

19. Mr Wright's case was that the decision to proceed was perverse (in the sense we shall describe later). The question was whether the FTT was entitled to proceed and to refuse the application for an adjournment on health grounds. The principles which apply are the same as those which apply in relation to an adjournment on medical grounds.

20. Mr Chacko relied on *Teinaz v Wandsworth London Borough Council* [2002] ICR 1471 as the leading case on such adjournments (to which it appears the FTT were not referred and did not consider). There the tribunal refused to adjourn the appeal despite the existence of medical grounds for the appellant's not attending. The EAT overturned that decision and the Court of Appeal upheld the EAT. In particular Mr Chacko relied on the observations of Peter Gibson LJ at [20] and [21]:

> "…Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment…
>
> [21] A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient that may be…But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant…to prove the need for such an adjournment."

21. Mr Chacko criticised the FTT's reasoning thus:

(1) the FTT did not properly recognise the scale of the impact on the quality of the evidence which would arise from its decision. It was effectively a decision to dismiss the appeal. The tribunal had recognised the highly fact sensitive nature of the issues at [86]. Judge Wallace, in setting aside Mr Nowlan's decision had commented that the absence of Mr Wright would almost certainly mean the dismissal of the appeal. That was the kind of severe result which Peter Gibson LJ referred to at [20] in *Teinaz* cited above;

(2) it was unreasonable to conclude that Mr Wright was "responsible for the poor quality of the evidence" (see [86] of the FTT decision quoted above);

(3) the medical evidence that Mr Wright was suffering from depression and unfit to attend was uncontested. It was not open to the FTT to conclude that Mr Wright was engaged in filibustering;

(4) in any event if Mr Wright was truly unfit then the fact that he had another motive for wanting an adjournment was irrelevant. The fact that one ground for an adjournment might be turned down did not mean that a different ground (health) should be refused as well;

(5) if the FTT had had doubts about the medical certificate it could have adopted Peter Gibson LJ's solution of asking for further details in *Teinaz* where he said:

> "[22]. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

(6) the choice was not between going ahead and an indefinite adjournment: the FTT failed to consider the relevant possibility of an adjournment for a fixed period;

(7) the effective dismissal of the appeal for the failure to provide a certificate in the right form was disproportionate;

(8) the possibility of Martin Wright and the witnesses attending had not been raised before the hearing started. It was wrong to take account of that possibility without being able to hear Mr Wright's views.

HMRC's submissions

22. Mr Nawbatt submitted that:

(1) there is no absolute rule that if an appellant cannot attend for health reasons the hearing should be adjourned. Mr Nawbatt relied on *O'Cathail v Transport for London*[2013] ICR 614 where there was unchallenged medical evidence that the appellant was unfit to attend and the Court of Appeal upheld the tribunal's decision not to adjourn even though the practical consequence was to deny the appellant participation in the hearing;

(2) where the tribunal gives an appellant the opportunity to adduce further medical evidence and the appellant does not take it, *Andreou v Lord Chancellor's Department* [2002] IRLR 728 showed that a tribunal may be justified in proceeding;

(3) in this case the tribunal had given fair warning in the Unless Direction of its intention to proceed if it did not receive medical evidence of prognosis. The tribunal had in fact taken the route suggested by Peter Gibson LJ at [22] in *Teinaz* (see above);

(4) the FTT properly took into consideration the possible prejudice to Mr Wright, recognising the importance of his evidence; but rightly it also took into consideration the long history and age of the appeal; and

(5) the FTT was entitled to take into account Mr Wright's previous insistence that he would not attend a hearing until his procedural complaints had been resolved. Martin Wright's letter of 3 August linked the two issues. That was relevant to his failure to provide evidence as to when he would be fit to attend.

Discussion

The relevant principles

23. Mr Wright did not make an application under rule 38 of the FTT's rules to set aside the FTT's decision. That rule permits a decision to be set aside if Mr Wright was not present at the hearing and it is in the interests of justice so to do. This appeal does not concern an application of that rule. It is not our function simply to determine whether it would be in the interests of justice to set aside the decision under it.

24. Rule 33 of the FTT's rules permits a tribunal to proceed in the absence of a party if it considers it in the interests of justice to proceed with the hearing. This was the rule cited by the FTT ([73]) and pursuant to which it concluded that it was in the

interests of justice to proceed. Rule 5(3) permits the FTT to adjourn or postpone a hearing. The FTT's decision could equally be seen as a decision not to exercise that power. By Rule 2 that power must be exercised so as to enable the tribunal to deal with cases justly and fairly having regard in particular to enabling the parties to participate and to avoiding delay. It matters not under which provision the FTT acted: the test is effectively the same. We agree with Mr Chacko that the principles in cases relating to adjournments such as *Teinaz*, are relevant in this case.

25. The issue before us is not whether it was in the interest of justice for the FTT to proceed or whether it was just and fair not to adjourn, but whether the FTT was perverse in deciding to proceed. We use "perverse" in this sense: a decision is perverse if it took into account irrelevant considerations or failed to take into account relevant considerations, if it was made on the basis of a material mistake of law, or if it was a decision which no reasonable tribunal could have made on the evidence before it. In *Teinaz*, Arden LJ said:

> 39. The starting point is that the appellate tribunal does not read the original application with a view to forming, and if necessary substituting, its own judgment as to the way the discretion should be exercised. Nor does the appellate tribunal consider whether the exercise of discretion by the inferior tribunal is one of which it approves. The discretion remains that of the inferior tribunal. The appellate tribunal only intervenes in a limited number of situations. It set aside the exercise of discretion by the inferior tribunal if the exercise of discretion is "outside the generous ambit within which reasonable disagreement is possible": see G v G [1985] 1 WLR 647, or, as this court put it in Carter v Credit Change Ltd [1981] All.E.R 252 at 258, the tribunal's decision is perverse or such that no reasonable tribunal could have come to. Other situations in which the appellate tribunal can intervene in the exercise of discretion by the inferior tribunal are where the tribunal has made a mistake in law, acted in disregard of principle, misunderstood the facts or failed to exercise the discretion. The other situation in which the appellate tribunal can intervene, and which is the relevant one in this case, is where the inferior tribunal took into account some irrelevant consideration or, alternatively, left out of account some relevant consideration.
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> 40. Two points flow from this last point. First, it is for the appellate tribunal to determine what considerations are relevant to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations. Second, unless permission is given for fresh evidence to be adduced on appeal, the appellate tribunal makes this determination on the factual material before the inferior tribunal. If the appellate tribunal finds that an irrelevant consideration has been taken into account or that a relevant consideration has been left out of account, the appellate tribunal must conclude that the exercise of discretion by the inferior tribunal is invalidated, unless it can be satisfied that the

consideration did not play any significant role in the exercise of the discretion and thus constituted a harmless error involving no prejudice to the appellant.

41. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong.

42…

43. I agree with Peter Gibson LJ that applications for adjournment may raise difficult problems requiring practical solution. While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further enquiries and a very short adjournment for this purpose. I am not, of course, saying that that course would necessarily have assisted in this case, but it may be helpful to advocates and tribunals to bear this point in mind in a future case. "

26. And in *Andreou v Lord Chancellor's Department* [2002] EWCA Civ 1192:

> [51] What is in issue in this case is the exercise of a discretion by the tribunal. The decision in *Tienaz* stressed that there is a high hurdle which an appellant has to overcome in order to succeed in a complaint that the exercise of discretion was improper and should be set aside…"

Andreou was a case in which after the provision of a medical certificate of inadequate specificity, the tribunal had given the appellant a week to produce a report answering four specific relevant questions. A new report was produced which failed to address those questions and after a final warning of the tribunal's intention the appellant's case was struck out when she failed to attend. The Court of Appeal upheld that decision.

The Communication to the FTT of medical evidence and of the actions taken by Mr Wright.

27. The FTT record that:

> (1) on 14 June 2011 Mr Wright applied for an adjournment on several grounds of which the last was that Mr Wright was unfit to attend the hearing;

(2) on 14 July 2011 Martin Wright sent the tribunal a medical certificate which said that Mr Wright was unfit to attend. The certificate gave the diagnosis "depression" but was unsigned;

(3) the tribunal made the Unless Direction on 20 July 2011 that "UNLESS" a signed medical certificate with details of Mr Wright's incapacity and explaining when he would be fit to attend a tribunal hearing was received by 28 July 2011 the 4 August 2011 hearing would go ahead;

(4) on 2 August the tribunal received (by email from Mr Wright's doctor's surgery) a signed version of the previously unsigned certificate described at (2) above;

(5) on 3 August, Judge Walters, having seen the signed certificate, decided not to adjourn the hearing, and the parties were so informed;

(6) on 3 August Martin Wright emailed the tribunal giving details of the state of Mr Wright's health – he was suffering from mental health problems. This email was placed before the tribunal and quoted at length in its decision.

28. We should note one other email which, because it was part of a sequence of emails ending with that in (6) is likely to have been before the FTT. This is an email of 2 August from Martin Wright in which:

(1) he acknowledged the Unless Direction;

(2) stated that he was on holiday at the time of its promulgation (but not when he had returned); and

(3) stated that Mr Wright, being anxious to comply with the Unless direction, had visited his doctor's surgery on 22 July and obtained confirmation that a signed certificate would be sent to the tribunal straight away;

(4) stated that the surgery had confirmed that an email and a letter had been sent on 22 July; and

(5) stated that Mr Wright's doctor had been ill and unable to sign the original medical certificate.

29. The FTT's file contains an email dated 22 July from the tribunal staff to the surgery attaching a copy "as requested" of the unsigned medical certificate for Mr Wright. It seems likely that this email was also before the FTT, and it would not have been unreasonable for it to conclude that the confirmation reportedly given by the surgery - see (4) above –was in fact the request from the surgery, prompted by Mr Wright's visit, for a copy of the unsigned certificate so that it could be signed. The email from the surgery of 2 August with the attached signed certificate said that "…Dr Olver unfortunately omitted to sign" the certificate and hoped that "this unfortunate oversight by the doctor will be taken in to account". To that extent it sits uncomfortably with Martin Wright's statement that the doctor had been ill. The FTT's decision however makes no mention of these matters .

30. Thus at the beginning of the hearing on 4 August the tribunal had a signed certificate that Mr Wright was unwell, evidence that this was a mental illness, depression, but not of its form or effects save that the doctor certified that Mr Wright was unfit to attend, evidence that Martin Wright had been on holiday when the Unless Direction had been received but no evidence as to how soon thereafter he had returned, and evidence that Mr Wright had taken some steps to comply with the Unless Direction, but it had had no information as to when Mr Wright would be fit enough to attend a hearing.

31. Mr Chacko said that the chain of correspondence showed that neither Mr Wright nor Martin Wright knew that the certificate which had been sent to the tribunal was insufficient. The certificate was sent to the tribunal but not to the Appellant or Martin Wright. Martin Wright's email of 2 August shows that he thought that Mr Wright had tried to comply with the Unless Direction. The FTT could not have concluded on this basis that Mr Wright and Martin Wright knew that the Unless Direction had not been complied with.

32. We accept that the evidence before the FTT did not permit it to conclude that Mr Wright and Martin Wright knew that the Unless Direction had not been complied with. But neither did the evidence compel the tribunal to conclude that Mr Wright or Martin Wright thought that the Unless Direction *had* been complied with. It seems to us that the FTT's comment at [87] that Mr Wright "failed to provide any medical opinion as to when he might be fit to attend" is accurate although the FTT gives no consideration to the ability or otherwise of Mr Philip Wright, a depressed builder, in the absence of his adviser properly to understand or ensure compliance with the Unless Direction.

Appraisal

33. It seems to us that if the FTT had restricted itself to balancing the undoubted prejudice Mr Wright would suffer if the appeal went ahead against possibility of uncertain delay if it postponed the appeal, the decision it reached could not have been regarded as unreasonable. Those factors were relevant and the FTT was entitled to reach a balance which favoured proceeding.

34. In particular it seems to us:

(1) that the FTT, because it had provisionally heard the appeal, properly realised the effect that a decision to proceed would have on the appeal (see FTT [86]);

(2) that depression (like stress and anxiety in *Andreou*) may take many forms and the FTT was entitled to consider that it was not clear whether the depression from which Mr Wright was suffering would prevent him from attending a hearing in the reasonably near future. As a consequence, without the more

detailed evidence it had sought as to when Mr Wright would be fit to attend it was entitled to be seriously concerned about when a hearing would eventually take place; and

(3) that its concerns about "indefinite adjournments" express not so much a worry that the case will never be heard, but the difficulty which would arise on setting a date since it had no prognosis. The FTT's concern was lest there be a succession of adjournments, not a single indefinite adjournment: it seemed to us therefore that it had in mind the possibility of at least an initial fixed term adjournment. This concern must also be seen in the light of the FTT's Unless Direction in which it had sought a prognosis and not received one, and a justifiable concern that the effect of any adjournment would mean at least several months delay.

35. A comparison with *Andreou* is instructive. In both cases the initial medical certificate was insufficient; in both cases the Appellant was given a chance to produce something fitting although a little more warning was given in *Andreou*; in *Andreou* the consequence was striking out the action, in Mr Wright's appeal the FTT adopted the less drastic procedure of hearing the case and taking into account only the written evidence supplied by Mr Wright.

36. We recognise, in Mr Chacko's criticism of the passage in the decision (para [86]) in which the FTT speaks of the poor quality of the evidence being Mr Wright's fault, a possible circularity: if the evidence was poor because Mr Wright was not present at the hearing, that was because the FTT had decided to go ahead without him: so that the poor quality of his evidence could not logically be a reason for proceeding in his absence, or a reason for diluting the weight to be attached to the prejudice which Mr Wright might suffer by reason of not being present at the hearing.

37. But, whilst the FTT prefaces this comment by speaking of the help it would have expected from oral testimony and "perhaps further documentary evidence", it seemed to us that this comment did not relate simply to Mr Wright's not turning up, but also to what was in the written statements which had been provided to the FTT. As the FTT said at [102] these were unsigned and contained no declaration of truth. The quality was poor despite earlier directions given by Judge Walters for the provision of detailed summaries of the witnesses' evidence.

38. It also seems to us that the FTT's consideration of whether Martin Wright could have appeared was, in view of the fact that he had appeared in the past for Mr Wright, not irrelevant (although it would have been better if some attempt had been made to put this to Martin Wright). It would have been entitled to conclude that Martin Wright did not attend because Mr Wright wished to postpone the hearing until after the resolution of the extra judicial complaints.

39. We accept that the FTT did not indicate that it had taken account of the efforts Martin Wright had said that Mr Wright put forth to ensure the delivery of the medical

certificate, but as we have noted above, the evidence was not such as to require the FTT to conclude that Mr Wright did not know that the certificate did not comply with the requirements of the Unless Direction in relation to his prognosis.

40. But the FTT also took into consideration at [95] the possibility that Mr Wright might be filibustering and that his claim that he was prevented by ill health from attending was not genuine. This was not a concern about the sufficiency of the medical evidence but about whether or not Mr Wright was fit to attend. Paragraph [95] is plainly directed at the medical reasons put forward for the adjournment.

41. In this context the repeated statements (on 17 May 2010, 7 March 2011, and 14 June 2011) in the communications from Mr Wright or Martin Wright to the tribunal referring to Mr Wright's unwillingness to attend before his procedural complaints were resolved justify the FTT's conclusion that Mr Wright wanted an adjournment pending the resolution of those complaints.

42. In paragraph [95] the FTT express doubts about the extent of Mr Wright's ill health. It does soon two grounds: (i) that the claim to ill health is a filibustering tactic designed to postpone the appeal indefinitely or until the resolution of the complaints, and (ii) that Mr Wright's ill health did not prevent him from pursuing those extra judicial complaints.

43. The FTT accepted that the medical certificate was evidence of ill health. For the FTT to have doubted its truth there must have been some reason to doubt what the person signing the certificate was saying. But it does not seem to us that the concerns over Mr Wright's desire to hold the tribunal proceedings over until the resolution of his procedural complaints can be relevant to the truthfulness of the certificate given by a third party. Thus the first ground is an irrelevant consideration.

44. The second ground was its suggestion that the "Appellant's health does not prevent him from pursuing his [extra judicial] complaints". But those were complaints being progressed with Martin Wright's help, and as the FTT would have been aware did not involve attendance in person before a tribunal. It does not seem to us that the FTT could reasonably have doubted the medical certificate on this basis.

45. If one were to read [95] as saying that, even if Mr Wright was ill, the fact that he was happy to use his illness as a delaying tactic was a reason for refusing the adjournment, that would, in our view, have been having regard to an irrelevant factor. Whether or not Mr Wright would be pleased by an adjournment, albeit caused by his ill health, is not relevant in assessing the balance of prejudice it might cause.

46. Thus the considerations in this paragraph were either irrelevant or could not have led to a reasonable doubt over the state of Mr Wright's health as expressed in the medical certificate. Therefore the doubts expressed in this paragraph were an irrelevant consideration.

47. The words of paragraph [96] make clear that the considerations in [95] were material to the FTT's conclusion. Thus we conclude that the FTT took into consideration a materially irrelevant factor. Accordingly its decision betrayed an error of law.

48. It does not seem to us that this was a harmless error involving no prejudice to Mr Wright or that the FTT would inevitably have reached the same conclusion had it not taken this factor into account. Accordingly we set the decision aside.

49. We remit the appeal to a differently constituted tribunal to remake the decision.

50. Although this conclusion is sufficient to dispose of the appeal, in case we are wrong, we go on to consider the second ground on which the appeal was brought (noting also that any apparent bias in the substantive decision might be regarded as tainting the decision to proceed).

Bias

51. In its decision the FTT made frequent reference to the earlier decision of Mr Nowlan (who became a Judge of the First Tier Tribunal on the abolition of the Special Commissioners). Mr Chacko submitted that the nature of these references is such as to give rise to a reasonable apprehension that the FTT had a predilection in favour of the conclusions reached by Mr Nowlan – conclusions which were adverse to Mr Wright – and therefore that it was biased against him.

52. There is little dispute about the relevant principles. They were considered by the House of Lords in *R v Gough* [1993] AC 646 where Lord Goff said:

> "The court should ask itself whether, having regard to [the relevant] circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."

53. In *Porter v MacGill* [2002] 2 AC 357, at [102] Lord Hope considered a modest adjustment to that test which had been proposed by the Court of Appeal:

> "the court must ... ask whether [the] circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

54. Lord Hope, with unanimous approval of their Lordships, approved that test but said that he would delete the reference to "the real danger" as it no longer served a useful purpose:

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

55. This he emphasised was an objective test. What was decisive was whether the fear of the complainant was objectively justified [104].

56. In *Lawal v Northern Spirit Limited* [2003] UKHL 35 the House of Lords applied the *Porter* test to find that a fair-minded and informed observer would consider that it was reasonably possible that the wing member of a tribunal, before whom there appeared an advocate who had sat as a part-time judge with that member, could be subconsciously biased in favour of that advocate's case. In the opinion of the Committee the following considerations indicated that an observer could so consider: the lay members looked to the judge for guidance on the law and could be expected to develop a fairly close relationship of trust and confidence with the judge; the observer would know that a recorder who in a criminal case had sat with jurors might not subsequently appear as counsel in a case in which one of those jurors served; and there was a rule prohibiting part-time judges in an employment tribunal from appearing as counsel before an employment tribunal which included lay members with whom they had previously sat.

57. If a tribunal has allowed some extraneous consideration to influence its decision - some factor which would distort its judgment - so that the tribunal leaned against a party in making factual judgments or came to the case with a closed mind, that is bias.

58. It is Mr Wright's case that the way in which the FTT referred to Mr Nowlan's decision is such that a fair-minded informed observer would conclude that there was a real possibility that the tribunal was biased in favour of Mr Nowlan's views.

The parties' arguments.

59. Mr Chacko submitted that:

(1) Mr Nowlan's decision had been set aside. Therefore it was a nullity, Although he accepted that the later tribunal may have regard to the earlier tribunal's views on the law, it should have had no regard to any conclusions of fact;

(2) the FTT repeatedly referred to Mr Nowlan's decision. It used it as a template: starting with Mr Nowlan's approach rather than a clean sheet;

(3) the FTT effectively required Mr Wright, not only to prove its case, but also to prove that Mr Nowlan was wrong;

(4) at no stage did the FTT make plain that it is not bound by anything in the Nowlan decision;

(5) the impression was therefore that Mr Wright started one point down;

(6) that is bias, or gives the appearance of bias, against Mr Wright.

60. It is certainly the case that on a quick view of the FTT's decision one could obtain the impression that the FTT was not approaching the issue afresh but in effect asking

itself an appellate question: namely whether Mr Nowlan had come to a proper conclusion, or one which could be supported by the evidence. Such an exercise would not have been the FTT's proper function which was to reach its own conclusion on the basis of the evidence before it, and if it applied that other approach it was asking the wrong question.

61. But the issue raised by Mr Chacko is different: Mr Chacko is not saying that the FTT adopted the stance of reviewing Mr Nowlan's decision, but that the FTT's continued reference, and apparent deference, to that decision would give rise to a reasonable apprehension (using that as shorthand for the *Porter* test) that the tribunal was unduly and improperly influenced by it so that it was biased in favour of Mr Nowlan's conclusion and against Mr Wright.

62. Finally there is a suggestion that the FTT's decision shows that it took account of Mr Nowlan's findings of fact in reaching its conclusion. To the extent the FTT did so in relation to any findings or inferences of fact, Mr Chacko says it was not entitled to do so.

63. Mr Nawbatt submitted that:

> (1) the decision contains a detailed appreciation of the evidence by the FTT on which it made its own decision without regard to Mr Nowlan's decision;
>
> (2) an independent observer would have concluded that the FTT reached its own conclusion.

The FTT's decision.

64. In the part of its decision addressing the substantive appeal the FTT refer to Mr Nowlan's findings 17 times. Of these 17 references 11 were in connection with its review of the previous hearing, and six were in its discussion of its own conclusions. In each of those six references the FTT expresses agreement with Mr Nowlan.

65. It was submitted on behalf of Mr Wright that these six references display a subconscious desire to agree with Mr Nowlan's conclusions. Mr Nowlan had different evidence before him from that before the FTT Mr Nowlan's conclusions on the evidence before him are irrelevant and extraneous to the drawing of conclusions on the different (and more extensive) evidence before the FTT. Given that there was no need to refer to Mr Nowlan's decision, and no shorthand benefit which could accrue to the reader in referring to it, the references display an unconscious leaning towards Mr Nowlan's conclusions or the illegitimate consideration of an extraneous matter.

66. The evaluation of this concern requires an examination of the structure of the FTT's decision and the context of the references to Mr Nowlan's decision.

67. The FTT started its consideration of the substantive appeal at [97]. At [100] it says:

> "This tribunal is therefore engaged in a re-hearing or re-trial of the appeal ..."

Although the FTT does not expressly say here that it is not bound by Mr Nowlan's decision or that it should not take it into consideration there is here a recognition that the tribunal is starting afresh and not on the basis of that decision.

68. In 23 paragraphs, between [101] and [124] the FTT set out its summary of the witness evidence (some oral, some written only). These paragraphs carry no reference to Mr Nowlan and record the relevant evidence with a measure of implicit acceptance of that evidence.

69. At [125] the FTT recorded that Mr Nawbatt "took us through the case stated by the General Commissioners, Lewison J's judgment and Judge Nowlan's decision". The FTT set out Mr Nawbatt's submissions on the first two of these in eight paragraphs from [126] to [133], and then dealt with Mr Nowlan's decision in seven paragraphs starting at [134]. These paragraphs end:

> "[141] Mr Nawbatt for HMRC supported Judge Nowlan's reasoning in its entirety and invited this tribunal to adopt it and Judge Nowlan's conclusion."

70. There were three aspects of the FTT's review of Mr Nowlan's decision on which we would comment:

(1) at [135] the FTT stated:

> "[135]. ... [Judge Nowlan] had received evidence from both Mr Morris and Mr Elliott and had the General Commissioners' case before him. He had not received statements (or, of course, oral evidence) from Mr Wright or Messrs Davis, Reagan Savage or Morgan. Judge Nowlan commented that he had enquired as to whether they had fallen out with Mr Wright and they had both responded by saying that they had not. Judge Nowlan went on to say: "In general I add that everything that they said sounded to me to be honest, and indeed realistic". This Tribunal, of course, has an indication in Mr Wright's statement that both Mr Morris and Mr Elliott were on bad terms with Mr Wright."

On the one hand the FTT here makes plain that the evidence it received was different from that before Mr Nowlan; but on the other hand the recitation of Mr Nowlan's comment on the honesty of the witnesses was irrelevant. That was a matter exclusively for the FTT. The reference to Mr Nowlan's views on the witnesses suggests that the FTT took into consideration an extraneous matter, even though it indicated that the evidence it had received might lead to a different conclusion.

(2) the seven paragraphs provide a fairly comprehensive summary of Mr Nowlan's decision. This included a recitation: at [136] of Mr Nowlan's

conclusion that “on the evidence that was given to him, the …workers…did work under the control of [the Appellant]”; at [139] of Mr Nowlan’s views on whose control was material; and, at [140], his views on the application of the other touchstones of employment.

These were findings by Mr Nowlan on the evidence before him. The FTT had to make its decision on the evidence it had. The reference to Mr Nowlan’s conclusions gives the impression that the FTT thought that they were relevant to its consideration when they were not;

(3) the adoption by Mr Nawbatt of that decision gives to the observer a somewhat different flavour to the expansive earlier summary. The recitation becomes at the same time a summary of HMRC's arguments. But although Mr Nawbatt could have been arguing that the FTT should reach the same conclusions on the evidence before it, the FTT should not have had regard to Mr Nowlan’s view of the evidence and Mr Nawbatt’s adoption of his conclusions cannot remedy that. There remains therefore a sense that the FTT may have had regard to Mr Nowlan’s view of the evidence.

71. The FTT then conducted its consideration in [142] to [155]. It stated

"[142].. In our review of the evidence before us, we have well in mind that the only evidence carrying a statement of truth and where witnesses presented themselves for cross-examination was that of Messrs Elliott and Morris ... Nevertheless we review all the evidence, which is more extensive than the evidence considered by Judge Nowlan.”

There is here an acknowledgement that the evidence before the FTT was different from that before Mr Nowlan and there is an implication that the FTT recognised that its decision could be different as a result.

72. In [143] and[144] the FTT reviewed the evidence on the issue of control, and, at [145] says:

"[145]. ... it is safe to conclude from this evidence (as Judge Nowlan did) that the workers were controlled in the sense relevant to employment ... we find on the balance of probabilities that such was the case ... indeed it is a feature of the evidence of ..."

This paragraph does not indicate that the FTT were either treating Mr Nowlan's factual conclusions or inferences as relevant or needing rebuttal. It is a statement of an independent conclusion which happens to coincide with that of Mr Nowlan. But it is noteworthy that the FTT felt the need to refer to Mr Nowlan’s findings on different evidence. The FTT’s conclusion would have been sufficient for its decision without the reference to that of Mr Nowlan.

73. The FTT then spent five paragraphs, [146] to [150], considering by whom control was in fact exercised before concluding:

"[151]. We agree with Judge Nowlan (see: the opening sentence of paragraph 43 of his decision) that the distinction between the analysis of the Appellant's business as one of providing labour to main contractors, on the one hand, or as one undertaking with main contractors to provide subcontract groundwork services, using his own workers to do this, on the other hand, is important."

74. The matter in which the FTT here agreed with Mr Nowlan was that the determination of the nature of the Appellant's business was relevant to deciding who exercised control. This consideration arose, Mr Nowlan had said, "in a case of this nature". There was therefore in the FTT's agreement an impermissible tacit acceptance of Mr Nowlan's finding of the nature of the case. But the real thrust of the FTT's decision in this passage can be seen as agreeing to a method of legal analysis rather than to factual findings. In the following paragraphs [152] to [155],the FTT sets out its own reasons for its conclusion on the nature of Mr Wright's business.. Although it prefaces these reasons by "we also agree" its reasons are plainly its own and make no reference to Mr Nowlan's findings, but in reaching its conclusions on the evidence before it, the fact that the FTT felt the need to refer to Mr Nowlan's conclusions on the evidence before him, or to express its agreement with him, when his decision on those matters was irrelevant, does give rise to a suspicion of bias, the implication of which we will consider below.

75. The tribunal reached its conclusions in [156 to 158]:

"[156]. Not only do we (for the reasons given above) agree with Judge Nowlan's conclusions that the Appellant's business was the provision of groundwork services, but we also agree with him that this fact points towards a conclusion that day-to-day control over the workers was in reality exercised by the Appellant and not the main contractors ... the Appellant's interest as against the main contractors was to carry out the works, and as against the workers to exercise day-to-day control over them directly or vicariously, to ensure that the works were carried out to an acceptable standard.

"[157]. Taking into account all of the evidence and giving each part of the evidence such weight as we consider appropriate, we conclude that the Appellant exercised sufficient day-to-day control over his workers to make them his employees. This is the answer we give to the question (essentially one of fact) which Lewison J remitted to the General Commissioners to determine.

[158]. On that basis we dismiss the appeal, only adding that we agree with Judge Nowlan's conclusion that by applying the "own business" test and by standing back and looking at the other provisions of the contract between the Appellant and the workers to see whether they were consistent with there being contract of service ... we would reach the same conclusions he did."

76. In reaching its own conclusion on the evidence before it, the FTT nonetheless had felt the need to express concurrence with the irrelevant conclusion reached by Mr Nowlan. Had the FTT merely said they agreed with Mr Nawbatt no concern would

have arisen. The informed reader thus asks him or herself why the reference was inserted.

Discussion

77. A fair minded observer would inform himself by consideration of the detail of the impugned decision, would know that the FTT was required to find facts on the basis only of the evidence before it, and would know that factual findings by Mr Nowlan were irrelevant to the FTT's consideration. In our judgment such an observer would balance the following considerations.

79.1 The FTT acknowledges that it has different evidence before it. That acknowledgment makes no sense if it did not at the same time realise that it could have found differently.

79.2 The FTT does not slavishly copy Mr Nowlan's decision: instead it sets out the evidence it received and explains how it reached its conclusions on that evidence. This is not a case where reliance on material produced by another gives rise to a perception that the tribunal never properly engaged with the possibility that the workers were not employees.

79.3 In two instances the FTT appears to treat as relevant to some degree Mr Nowlan's findings of fact. Those instances are noted at [70] and [74] above.

79.4 Whilst it might be suggested that, in agreeing with Mr Nowlan's decision, the FTT was in fact indicating that it accepted the Respondents' case (see paragraph [71] above), the FTT had different evidence before it.

79.5 The unnecessary and irrelevant references to Mr Nowlan's decision as comparators for its findings.

79.6 The authority apparently accorded to Mr Nowlan's decision..

79.7 An appreciation that the members of the FTT were sworn to do justice without fear or favour.

80. Bearing in mind these considerations the fair minded observer has to consider whether there was a real possibility of bias in favour of Mr Nowlan's conclusions; a simple possibility of bias is not enough. The issue is not whether the FTT was biased but whether its decision gives rise to the reasonable apprehension of a real possibility of bias.

81. Although a careful inspection of the passages in which reference is made to Mr Nowlan's decision show that the FTT making up its own mind first and then expressing agreement with Mr Nowlan, the references the FTT makes to Mr Nowlan's decision, in particular the references it makes to that decision when it has no need to do so, give rise in our minds to the possibility that the tribunal had an

conscious or subconscious desire to agree with that decision, or to recite evidence with the aim of coming to the same conclusion: why else did each substantive conclusion need to be measured against that of Mr Nowlan?

82. If the fair minded observer could see no other likely explanation for those references he would in our judgment fairly come to the conclusion that there was a real possibility of bias. But the only other explanation that we can think of is that the FTT was signalling that Mr Wright was wasting his and other people's time; and if it wished to say that, it could have said so directly. It seems to us that this possibility is sufficiently unlikely that we must conclude that there was a real possibility that the FTT consciously or subconsciously leaned in favour of the extraneous findings of Mr Nowlan.

83. We have not found this an easy decision. It is not without some considerable hestitation that we have concluded for the above reasons that a fair minded informed observer would conclude from the text of the decision that there was a real possibility of bias.

84. For the above reasons we set aside the FTT's decision on this issue as well as on the earlier matter.

Disposition

85. We remit the appeal to a fresh panel of the FTT.

CHARLES HELLIER **JILL GORT**

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 26 SEPTEMBER 2013