

SCOTLAND / JUDGMENT

Secretary State Work Pensions v Cunningham [2004] ScotCS 211 (06 August 2004)

[2004] ScotCS 211

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[2004] ScotCS 211 [New search] [Help] Secretary State Work Pensions v Cunningham [2004]
ScotCS 211 (06 August 2004) EXTRA DIVISION, INNER HOUSE, COURT OF SESSION Lord
Marnoch Lord Osborne Lord Cameron of Lochbroom OPINION OF THE COURT delivered
by LORD MARNOCH in APPEAL TO THE COURT OF SESSION under Section 15(1) and (2)
(a) of the Social Security Act by THE SECRETARY OF STATE FOR WORK AND PENSIONS
Appellant ; against A decision of the Deputy Social Security Commissioner of 19 February
2003 in APPLICATION FOR A DISABILITY LIVING ALLOWANCE by HELEN CUNNINGHAM
Respondent :

Act: Brodie; H. F. Macdiarmid (Appellant) Alt: D O'Carroll; Anderson Strathern (for Naftalin,
Duncan & Co, Glasgow) (Respondent) 6 August 2004 [1] This is an appeal under section 15(1) and
(2)(a) of the Social Security Act 1998. The decision of the Deputy Social Security Commissioner
appealed against concerned an application for disability living allowance (DLA) by one, Helen
Cunningham, and it recalled an earlier decision of the Appeal Tribunal on the ground that the
composition of the Appeal Tribunal "was such that an informed bystander would conclude there
was a real possibility that the Tribunal was biased." Counsel were agreed that the passage which
we have quoted accurately reflected the test for "apparent bias" as laid down in recent authority
and, in particular, by the House of Lords in *Lawal v. Northern Spirit Ltd.*

[2003] ICR 856 . At para. 21 Lord Steyn, delivering the Opinion of the Appellate Committee, puts
the matter in this way: "The principle to be applied is that stated in *Porter v. Magill* ,
namely whether a fair-minded and informed observer, having considered the given facts,
would conclude that there was a real possibility that the Tribunal was biased. Concretely,
would such an observer consider that it was reasonably possible that the wing member

may be subconsciously biased?". The reference to the "wing member" appears to be a reference to one or other or both of the lay members who sit on an Employment Appeal Tribunal. Although elsewhere in his decision the Deputy Commissioner describes the test in slightly different language from that which he employs at the outset, such as by the use of the word "might" rather than the word "would", we are satisfied that, read in their overall context, these minor variations do not of themselves suggest any material misdirection on his part. [2] The factual circumstances on which the Deputy Commissioner based his decision are simple enough. In brief, in the two years prior to the Appeal Tribunal hearing one of the three Examining Medical Practitioners (EMPs), Dr. B, (whose evidence was in the end accepted by the Tribunal) had sat as a medical member of the Tribunal, with the chairman during 22 sessions, with the disability member during 14 sessions and with both the chairman and the disability member during 3 sessions. In that situation, the Deputy Commissioner held that the "relationship" which might be expected to have developed between Dr. B and two of the members of the Appeal Tribunal was such as to satisfy the test for apparent bias. In reaching that decision he had regard to the authorities of *In re Medicaments and Related Classes Goods (No. 2)*

- [2001] 1 WLR 700 ; the decision of the Court of Appeal in *Lawal v. Northern Spirit Ltd.* cit. sup. (subsequently overturned by the House of Lords) and a decision of the Commissioners in *CSDA/1019/99* (subsequently overturned by this court sub. nom. *Secretary of State for Work and Pensions v. Gillies* 2004 S. L. T. 14). What he says in paras 39-44 of his decision is this: "39. In *Lawal* , admittedly a close decision, as there was one dissenting opinion, the Court of Appeal held that it could not be said that it was reasonable to apprehend that a lay member of a tribunal would, even subconsciously, react more favourably to an advocate who sat as a part time member from time to time than to one who did not sit [Lord Phillips at 47]. Lord Phillips did go on to say that frequency of sitting might be an issue.
40. The question in this case is whether or not the situation is different, where the issue is between part time membership of the tribunal and appearing as an expert witness. I can readily understand that lay members of a tribunal understand that an advocate presses his client's case to the best of his ability and therefore would not necessarily be influenced by a professional relationship in another capacity. I do consider that the situation is different, where a tribunal is being asked to assess the credibility, reliability or expertise of a witness and to decide what weight to give to their evidence as compared to the evidence of other experts. If there is apparent bias it could work either way depending on what is known from the relationship. I have to decide whether this difference is sufficient to give rise to a real apprehension that there might be bias.
41. I note in *In re Medicaments* at paragraph 37 that that (sic) Lord Phillips MR observes that bias can come in many forms and in particular that a judge 'may be biased not in favour of one outcome of the dispute, but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness.' It is well known that a judge will recuse (sic) himself if he knows any of the parties or if he knows

any of the witnesses, there being a distinction between know and know of. Equally judges find that particular experts appear regularly before them - it might be said that such experts 'have the ear of the court' because the court knows them and respects their expertise. No one suggests that a judge is biased merely because a particular witness appears before him on a regular basis. This is the situation before tribunals where it has been accepted that EMPs can be credited with some special knowledge of how medical reports should be directed to the relevant issues before the tribunal and therefore, having balanced the material, their evidence might be given more weight.

42. That said I have come to the view that an expert witness is in a different position to an advocate, where both are part time members of a tribunal before whom they appear in their respective capacities. I consider that a well informed layman might conclude that there was a real possibility of bias, where an expert appears before a tribunal including members with who (sic) he has sat on a number of previous occasions. This is more likely to be so before a tribunal where the evidence is written and the tribunal does not see all the experts giving evidence and being cross-examined so that they can make a proper comparison. If one expert is professionally known to the members, through having sat with them and advised them on how to approach medical evidence, I can see that there is a danger that they will apply their knowledge of him, consciously or unconsciously, to an assessment of the weight to be given to his evidence as against the other Reports, where the doctor concerned might not be known to the tribunal.
43. I take support for this conclusion from the approach taken in CSDA/1019/99 that an EMP sitting on a tribunal might be perceived as possibly favouring the evidence of a fellow EMP. At paragraph 77 the Commissioners said: 'However, placing ourselves in a position of the objective bystander, we consider that for one of these same doctors to be involved in assessing such reports prepared by other such doctors and then adjudicating in conflicts of evidence between such reports and other evidence causes reasonable apprehension of at least a subconscious bias. Accordingly, and whatever our own judicial view, we think it would be reasonable for an informed member of the public to think that justice may not be done in such circumstances.' I would have reached my conclusion independently of the decision in CSDLA/1019/99 for the reasons given above.
44. As I commented above I consider that the description of Dr B in the Statement of Reasons as 'experienced in carrying out assessment of functional impairment and disinterested in the outcome', when the description is not applied to the other EMPs could be said to give rise to an apprehension of bias. While I consider that description as almost 'style', where an EMP is to be preferred to another doctor, it might be said to show that the tribunal actually knew from their knowledge of Dr B that he had this special skill, which the other doctors were not known to have developed." [3] For present purposes we leave out of account what is said by the Deputy Commissioner in para 44 supra because we are inclined to accept the view of both counsel that the informed observer, in common with the Deputy Commissioner, would regard the words in question as being essentially words of "style". For the rest, however, with

the possible exception of the use of the word "might" in para 42, the reasoning summarised above is in our opinion unimpeachable. In that connection, it is clear, in our view, that the frequency of occasions on which Dr. B had sat with the chairman and disability member was not - and indeed cannot - be left out of account. So far as the authorities considered by the Deputy Commissioner are concerned, it is true that the decision of the Commissioners in CSDLA/1019/99 was overturned on appeal to this court. However, the Deputy Commissioner makes it clear that he would have reached the same conclusion independently of that decision and, in our opinion, the facts of that case are, in any event, readily distinguishable. As regards Lawal, it is, of course, no longer necessary to distinguish that case and, following the reasoning of the Deputy Commissioner, we are of opinion that the present case can be seen as being an even stronger case for the application of the doctrine of perceived or "apparent" bias. Not only does the same "collegiate relationship" obtain - to borrow a phrase from Lord Steyn - but in the present case the former member of the Tribunal was one of a number of expert witnesses whose conflicting evidence had to be assessed, not even in person but simply on paper. Bearing in mind the influence which Dr. B may reasonably be expected to have exerted during his previous dealings with two of the three members of the Appeal Tribunal, we can well understand how this state of affairs would be - again to borrow a phrase from Lord Steyn - "worrying in the eyes of the fair-minded observer". There are, of course, other points of distinction between Lawal and the present case, such as the lack in the present case of any analogy equivalent to the directive in that case that "no part-time chairman may ... appear as an advocate before any Employment Tribunal in the whole of [the] region [to which they have been assigned to sit as a chairman]." - see para 18 of the ICR Report. There is also the distinction that in Lawal the barrister in question had formerly sat as chairman of the Tribunal - an office which might be thought to carry particular influence. In our opinion, however, these considerations pale into insignificance when taken along with the other considerations to which we have already referred. Counsel for the appellant further submitted that in the present case the informed bystander would be aware that, unlike the adversarial setting of the Employment Appeal Tribunal, the proceedings in question were essentially of an inquisitorial or fact-finding nature. He would also be aware that the EMPs were professional medical men with special training. In our opinion, however, while all that may be so, the fact remains that the Tribunal in question had to assess and, to some extent, choose between the expert evidence from three EMPs, only one of whom, so far as we know, had previously sat with members of the Tribunal. [4] Lastly, counsel for the appellant was at pains to submit that an informed observer would also have - and here I quote from the Grounds of Appeal: "knowledge of all the medical evidence before the tribunal; an understanding that the evidence of Dr B was, at least in part, supported by medical evidence provided by another examining medical practitioner's report; an understanding that the tribunal's decision was not based solely on acceptance of Dr B's evidence in the absence of any supporting evidence; the training given to tribunal members; their experience in adjudicating on disputed claims and competing bodies of evidence; their ability to distinguish between the role of a tribunal member and that of an examining medical practitioner providing a medical report based on one visit and assessment of a

claimant; and the role played by the medical member of the tribunal in question in advising on the content and significance of the medical reports before the tribunal, including that of Dr B." In our opinion, however, all these are, at best, marginal considerations which do not significantly detract from the respondent's argument that the relationship which might be expected to have developed between Dr. B and two of the three members of the Tribunal was such as would lead even the most informed observer to think that there was a real possibility of sub-conscious bias in favour of Dr. B. In particular, it cannot, we think, be assumed that the influence of the medical member of the Appeal Tribunal would, as it were, operate as a "counter balance" against the former influence of Dr. B, as was submitted by Mr. Brodie for the appellant. [5] In the result, we required little persuasion from Mr. O'Carroll, for the respondent, that this appeal should be dismissed. We do not find it necessary to rehearse in detail the submissions which he made because, in substance, they reflected the reasoning outlined above. He did, however, make one additional point, namely that the distinction in the role of the doctor when sitting as a member of the Tribunal and when giving evidence as an EMP is considerably less marked than the distinction between presiding as legal chairman and acting as barrister in the case of Lawal . We agree with that submission and for that reason, also, we consider that in the present case there is an even greater risk of sub-conscious bias than there was on the facts of Lawal . [6] For the foregoing reasons the appeal will be dismissed. Before parting with the case, however, we do take note of a request by Mr. Brodie, Advocate, on behalf of the Secretary of State, that, if we were against him, it would nonetheless be helpful to have clarification as to how far our decision depended on the frequency with which Dr. B had previously sat with two of the three members of the Tribunal. We do understand the practical considerations underlying that request and in that connection we note that in Lawal the House of Lords felt able to "concentrate on a systemic challenge and apply a principled approach to the facts on which it [was] called to rule." In that case, therefore, it was apparently decided that if the barrister had previously sat with a member of the Tribunal on only one occasion, that would be enough to give rise to a complaint of apparent bias. Sitting in this court we do not, of course, have the same authority as the Appellate Committee of the House of Lords wherewith to make such far reaching pronouncements. Moreover, we are reluctant to assert that our decision would necessarily have been the same if, for instance, Dr. B had formerly sat on only one occasion, perhaps a long time ago, with, say, one member of the Tribunal. That or similar questions will be for another day unless, that is, they are pre-empted by a change of practice in the interim. Coming back to the facts of the present case all that it is necessary to hold is that the extent of the relationship which may reasonably be expected to have developed between Dr. B and two of the members of the Tribunal was such that the informed observer would perceive a real risk of sub-conscious bias on their part in favour of Dr. B's evidence. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2004/211.html>

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