THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 79

Record Number 478/2017

Irvine J.
Hogan J.
Whelan J.

BETWEEN/

HEINZ-PETER NASHEUER

RESPONDENT /

PLAINTIFF

- AND -

NATIONAL UNIVERSITY OF IRELAND GALWAY

APPELLANT /

DEFENDANT /

JUDGMENT of Ms. Justice Irvine delivered on the 21st day of March 2018

1. This is an appeal brought by the defendant, National University of Ireland, Galway, ("NUIG"), against the judgment and order of the High Court, Baker J., of the 22nd September 2017 and the 6th October 2017 respectively. By her order she directed that an investigative process which was then in being concerning a complaint made against the plaintiff, Heinz-Peter Nasheuer ("Professor Nasheuer") be stayed under the trial of the proceedings.

Background
2. Professor Nasheuer is a Professor of Biochemistry at National University of Ireland Galway ("NUIG").

3. In April, 2014 a member of the staff of NUIG ("the complainant") made complaints of bullying and harassment against nine members of staff, including Prof. Nasheuer. As a result of a disagreement between the complainant and NUIG as to whether NUIG's Internal Grievances Procedures or its Staff Anti-Bullying Policy should apply that dispute was referred to an Adjudication Officer whose recommendation was then appealed to the Labour Court under the Industrial Relations Act 1969 ("the 1969 Act").

4. In a recommendation made on the 18th October, 2016 under s. 13(9) of the1969 Act, the Labour Court recommended that an independent external investigator should be appointed to carry out an investigation into the claimant's complaints. It was agreed between the parties, i.e., the complainant and NUIG, that the Labour Court would nominate such a person. The Labour Court concluded its recommendation in the following manner:-

> "It is the decision of the Court that the investigator, having reviewed the extensive documents submitted to the Court and having consulted with the parties, should determine the terms of reference and the scope of the investigation. In doing so, the investigator must have regard to the University's policies, including its Grievance Procedure and its Staff Anti-Bully Policy. The investigator's decision in these matters will be final. In carrying out the investigation, the investigator must have regard to fair procedures and natural justice rights of both the Claimant and the alleged wrongdoers."

5. The Labour Court proceeded with the consent of the parties, to appoint a Ms. Janet Hughes ("Ms Hughes") to investigate the complaint. A second investigator was appointed at a later date but this fact is not material to the issues under consideration on the appeal. Ms.Hughes had been the regional secretary of SIPTU between 1990 and 1997 with responsibility for the Sligo, Clare and Galway areas. At the time of events in issue on this appeal she was working as an Industrial and Employee Relations practitioner

6. By letter of the 10th April, 2017 Ms. Hughes wrote to Professor Nasheuer to advise him that the investigation would commence in May 2017. She stated that her letter followed separate communications and engagement with and between the complainant and NUIG. She enclosed:-

1. The terms of reference and scope of the investigation, which she stated were final.
2. The proposed methodology to be followed by the investigation team. She invited Professor Nasheuer to submit any comments or proposals he might have concerning the methodology to be adopted within fourteen days.
3. The Labour Court recommendation.
4. Extracts from the Grievance document submitted by the complainant.
5. The list of the nine respondents against whom the complainant had complained.
6. The documents that had been submitted by the complainant in support of her complaint against Professor Nasheuer.

7. Finally, in her aforementioned letter, Ms. Hughes advised Professor Nasheuer that it was her intention to interview each respondent in order to provide them with the opportunity to respond to the grievances in their case as the first step in the investigating process.

8. The terms of reference made clear that the investigator had identified thirty five individual complaints made against nine members of staff and advised that the investigation would examine each complaint of inappropriate behaviour and would make a finding as to whether the event occurred and, if so, whether the conduct represented inappropriate treatment or behaviour towards the complainant as defined under the bullying procedures of NUIG.

9. By letter dated the 11th May, 2017 addressed to Ms. Hughes, Messrs O'Mara Geraghty McCourt, Solicitors acting on behalf of Professor Nasheuer, complained that whilst the complaint had been made in April 2014 their client had not been informed about it until the 1st December 2016. The letter expressed concern that the complaints extended back to 2004 and Ms. Hughes's attention was drawn to the University's Dignity At Work policy from which it was to be inferred that complaints should be processed with expedition. Regardless of the recommendation of the Adjudication Officer and the appeal to the Labour Court, about which the writer of the letter, Mr O'Mara, was unaware, it was, he stated, unacceptable that it had taken the University three years to present Professor Nasheuer with a redacted version of the complaint against him. Mr O'Mara maintained that the contemplated process had been invalidated by delay.

10. Correspondence concerning this delay was also the subject matter of several letters to the Chief Operations Officer of NUIG wherein it was stated on Professor Nasheuer's behalf that insofar as NUIG relied upon that period of time during which the dispute between the complainant and NUIG was under consideration by an investigating officer and later the Labour Court, it had been inappropriate of NUIG to engage in that process rather than decide itself how to deal with the complaint. The correspondence further complained that the terms of reference did not provide Professor Nasheuer with "the protections he required to address the issues of the University's handling of this matter to date" whilst noting the assurance that Professor Nasheuer would be afforded the full panoply of constitutional rights, fair procedures and natural justice by the investigation team.

11. By letter dated the 16th June, 2017 Professor Nasheuer's solicitor, Mr. O'Mara, once again wrote to Ms. Hughes stating, "for the sake of clarity", that his client had not agreed with the terms of reference proposed. The letter did not specify why it was that the terms of reference were considered offensive. Mr. O'Mara nonetheless acknowledged the assurance received from NUIG that the investigation process would afford Professor Nasheuer his "full panoply of constitutional rights to fair procedures and natural justice". An assurance was sought that Professor Nasheuer would be entitled to legal representation and would be afforded the right to examine and cross examine witnesses. In addition, Ms. Hughes was asked to confirm that she would amend the terms of reference so that she would have jurisdiction to address how the process had been managed to date and to include a direction that the matters should not proceed by virtue of the "delay in the process to date".

12. In her letter of reply dated the 19th June, 2017, Ms. Hughes stated that the terms of reference had been decided and that Professor Nasheuer had been on notice to this effect since April 2017. She referred to the decision of the Labour Court pursuant to which she was to decide the terms of reference. She advised that she was not required to agree the terms of reference with the complainant, NUIG or any of the respondents. She also drew Mr O'Meara's attention to the fact that there was no such requirement under either the grievance or anti-bullying policy of NUIG or under statute. She confirmed that the terms of reference were not agreed with the complainant and stated clearly that it would be misleading for her to agree to a meeting premised upon any alteration in the terms of reference as they were fixed. She confirmed that Professor Naseuer would have an entitlement to cross examine and to be represented and also expressed her view that the delay during the period 2014 to 2016 prior to the Labour Court decision had no place in the investigative process.

13. On the 21st July, 2017 Professor Nasheuer attended a meeting with the investigators. He was represented by solicitor and counsel. This court has been provided with a transcript of that hearing from which it is clear that, in an early opening exchange between Ms Hughes and counsel for Professor Nasheuer, it was accepted that the investigator could not have been expected to deal with the issue of the delay between the date of the complaint and the date this was notified to Prof Nasheuer as she had not been aware of it. It is also clear from the transcript that counsel acknowledged that Ms. Hughes had made clear that Professor Nasheuer would be entitled to make the case in the course of the inquiry that certain aspects of the complaint could not be considered in light of the delay, an acknowledgment which she described as a "welcome development".

14. In the course of the aforementioned hearing, counsel raised what she described as a serious issue "going to the heart of the investigation process", namely that it had come to her attention that Ms. Hughes, at some earlier date, had acted in her capacity as a trade union representative on behalf of the complainant in proceedings before the Labour Court. She asked Ms Hughes whether she was correct in her understanding.

15. In response, Ms. Hughes confirmed that due to the illness of another staff member of SIPTU in 1996, she had taken over the conduct of three hearings scheduled before the Labour Court on one particular day. One of the cases had been brought by the complainant against the University. Ms Hughes stated that she met the complainant twice regarding that matter and had no further dealings with her after the case was over. As a result of her prior involvement with the complainant having been brought to her attention, in October or November 2016 she had written to the complainant and the University asking whether they had any objection to her appointment and both confirmed they had none such. She also disclosed that she knew some of the respondents due to her previous role as a trade union official and her professional role wherein she acted as an independent third party. She also explained that her name had been proposed by the University in 2014 and not by the complainant and further made clear that she would exercise her role in the matter without fear or favour to anyone.

16. Following a number of further exchanges with counsel, Ms. Hughes made clear that she intended to proceed with the investigation regardless of Professor Nasheuer's request that she would recuse herself in light of her past dealings with the complainant.

17. It should be stated that in the course of aforementioned the hearing counsel also took exception to the fact that Ms. Hughes had consulted with the complainant and the University concerning the terms of reference and the methodology she proposed to adopt. She submitted that it was strikingly unfair that the respondent had not been made aware of that communication or of her past dealings with the complainant. The fact that her correspondence with the complainant had not been notified to Professor Nasheuer suggested he would not be afforded a fair hearing.

18. In response to counsel's complaint that her client had not been made aware of correspondence concerning the terms of reference, Ms Hughes made clear that the terms of reference were not open for discussion having regard to the Labour Court recommendation. Under the Labour Court recommendation she was to determine the terms of reference. She had complied with the recommendation insofar as it provided that the parties to the dispute were to be consulted concerning the terms of reference. Whilst the complainant and the University, as "the parties" were given an opportunity to comment on the terms of reference, their agreement was not required and she confirmed that it was she who had decided the terms of reference.

19. As to the methodology she intended to deploy, Ms Hughes confirmed that a draft of what she proposed had been issued to all of the respondents (including Professor Nasheuer), as well as the complainant and the university. All had been offered an opportunity to make observations in relation thereto. Professor Nasheuer had been given exactly the same opportunity as the complainant to comment on the methodology but had not done so.

20. In response, counsel made clear that her principal concern was her client's objection to the investigation progressing in

circumstances where Ms. Hughes had previously acted on the complainant's behalf. She stated that her client was objecting to Ms. Hughes continuing to act on the grounds of the perceived bias arising from the fact that she had previously acted for the complainant and in circumstances where her client was not consulted or given an opportunity to make his views known on the matter.

21. Following the hearing before the investigators on the 21st July, 2017 Professor Nasheuer's solicitor complained to NUIG that the failure on the part of the investigator to disclose her prior dealings with the complainant was evidence of objective bias. He complained also about the investigator's refusal to amend the terms of reference "to admit our client's complaint that this investigation should not proceed" and called upon the University to bring the investigation to a close by standing down the investigation team. In that letter it was asserted that had the Labour Court known of Ms. Hughes's prior dealings with the complainant it would not have endorsed her appointment.

22. In its reply of the 26th July, 2017 NUIG made clear that the Labour Court had been advised of Ms. Hughes's past dealings with the complainant in 1996 and had nonetheless endorsed her appointment. The nature of the previous dealings between Ms Hughes and the complainant had, according to NUIG, been both brief and limited and had no connection to the subject matter of the current investigation. It also rejected the assertion that any adverse finding had been made against Professor Nasheuer with regards to the terms of reference.

23. The last letter authored by Professor Nasheuer's solicitor prior to the institution of the present proceedings was that dated the 27th July, 2017 and was addressed to the Chief Operations Officer in NUIG. It reasserted Professor Nasheuer's position that Ms. Hughes should stand aside on the grounds of objective bias. The fact that she had acted for the complainant in the past was, it was claimed, sufficient reason to rule her out as an appropriate person to investigate the complaints. The fact that the Labour Court chose not to intervene on the matter did not alter the situation. NUIG ought to have brought Ms. Hughes' prior involvement with the complainant to Professor Nasheuer's attention and he should have been invited to be heard on the issue.

24. Of some marginal importance in the context of this appeal is the fact that in the last mentioned letter there was no mention of any other factor which would have warranted Ms. Hughes standing down as investigator. There was no reference to the failure on the part of Ms Hughes to consult Professor Nasheuer concerning the terms of reference or any complaint as to the circumstances in which Ms Hughes had finalised the methodology to be deployed in the investigation.

Court proceedings

25. Professor Nasheuer commenced the within proceedings against NUIG on the 28th July, 2017. By notice of motion of even date Professor Nasheuer sought a number of reliefs. Principally, he was concerned to obtain an injunction prohibiting NUIG from continuing with the investigation into the complaints made against him. Following an oral hearing which took place on the 13th day of September, 2017 Baker J. delivered her judgment on the 22nd September 2017 and granted the relief sought.

26. Concerning the matters raised for her determination, the High Court judge noted that the observance by the investigators of the Labour Court direction that she consult with "the parties" and the fact that Professor Nasheuer was not a party did not answer his objection that he should have been allowed address the investigators before the terms of reference were finalised. She noted Professor Nasheuer's argument that the failure of the investigator to afford him an opportunity to have some constructive input into the terms of reference, when such an opportunity had been afforded to the complainant and NUIG, was demonstrative of objective bias. The trial judge also observed that the terms of reference were lengthy, in that they identified thirty five individual items to be investigated and that the evidence before her did not show how the investigative team had come to identify these thirty five items. While it was clear that Ms. Hughes had had contact with the complainant and NUIG in arriving at the final list of issues, the affidavit evidence did not provide any information as to the extent and nature of that contact.

27. Having concluded that the relief sought could not be categorised as mandatory, the trial judge concluded that the relevant test to be met on the injunction application was whether by Professor Nasheuer had established "a fair question to be tried and whether the interests of justice required that such relief be granted".

28. In dealing with whether Professor Nasheuer had established a fair question to be tried concerning the apprehension of bias the trial judge referred to the two factors which had been relied upon to support his claim of objective bias. Because the parties on this appeal were not *ad idem* as to the manner of the trial judge's approach to the complaint of objective bias, I have decided to set out in full how, at para, 18 of her judgment, she described the argument advanced on Professor Nasheuer's behalf. This is what she said:-

> "18. The plaintiff's argument is centred on the argument of bias. The plaintiff objects to the involvement of Ms. Hughes in the investigation on grounds of demonstrable and objective bias. Two factual elements are relied on. The first is the prior involvement between Ms. Hughes and the complainant in 1996, the second her refusal to hear the plaintiff before making her final determination of the framework for the investigation. The plaintiff does not argue that a right to be consulted in regard to the terms of reference and scope of the investigation arises of itself, but because Ms. Hughes had consulted with the complainant and the University before finalising the terms of reference and scope."

29. Not that it is of any great import, but I feel I should say that I consider it likely that the trial judge did not intend to refer to the "framework for the investigation" in the aforementioned paragraph. I consider it far more likely that she intended to refer to the terms of reference in the particular sentence. I say that for two reasons. First, it is beyond doubt that Professor Nasheur was invited to make submissions on the proposed framework (see letter of Ms Hughes of 10th April 2017), a fact that the trial judge would not likely have overlooked. Second, in the following sentence she refers to the failure on the part of Ms Hughes to consult Professor Nasheur concerning the terms of reference.

30. Having set out the test for objective bias as described by Denham J. in *Bula Limited & Ors. v. Tara Mines Limited & Ors. (No. 6)* [2000] 4 I.R. 412, the trial judge stated that she did not purpose to engage in considering whether there was a distinction to be drawn, for the purposes of the injunction application, between Ms. Hughes, an employment consultant acting as investigator and a judge who would determine proceedings against the backdrop of the oath they had taken on their appointment.

31. Concerning Ms. Hughes's prior rofessional engagement with the complainant, the trial judge rejected in clear and unequivocal terms that such involvement might raise a reasonable apprehension of bias. She stated that the involvement was too remote, was wholly professional and had asisen, not because the complainant employed Ms. Hughes to act on her behalf, but because of the happenstance that she was filling in for a colleague who was on sick leave.

32. The trial judge considered that the second element of the plaintiff's argument carried more substance. In circumstances where Ms. Hughes had engaged with the complainant and the University concerning the terms of reference and had then refused to engage with Professor Nasheur, she had "created circumstances which looked at as a whole, would give rise to an apprehension of bias in a

reasonable person". She then instanced such circumstances which may be summarised as follows:-

> (a) A reasonable person reading the detail of the numerous, specific and isolated incidents in the terms of reference might reasonably apprehend that there had been detailed engagement between Ms. Hughes and the complainant.
> (b) The unequivocal refusal to permit Professor Nasheuer an input into the terms of reference had reasonably led him to be concerned. Concerning that input the trial judge made clear that she understood he had wanted to make a focused argument regarding the antiquity of some of the incidents complained of and was not seeking to make a more generalised argument regarding the terms of reference.
> (c) The fact that Ms. Hughes in her letter of the 19th May, 2017 had said that in coming to her conclusions she would consider any prejudice arising from delay was not an answer to the argument that the terms of reference might have been influenced in a substantive manner by engagement with the complainant.

33. The trial judge went on to conclude that the input of the complainant and the University in fixing the detailed substance of the terms of reference was sufficient to raise, in the mind of the informed observer, an apprehension of bias sufficient to meet the standard required to grant a stay on the continuation of the investigation pending a full trial.

34. In granting the stay the trial judge rejected the defendant's reliance upon the decision of Keane J. in *O'Connell v. Adelaide and Meath Hospital* [2016] IEHC 423 and that of Clarke J. in *Minnock v. Irish Casing Company Limited*. She concluded that the investigation was not purely investigative in nature in that the investigators were entitled to make findings of fact that were incapable of being reversed at a subsequent stage of the process. They were entitled to determine whether the behaviour complained of had occurred and also to determine whether it was inappropriate. Thus, if she did not arrest the investigative process at this point if that process was later considered to be sufficiently flawed it might prove impossible to provide Professor Nasheuer with an adequate remedy having regard to the reputational damage that might have occurred.

The appeal
35. By the time the appeal was heard by this court the grounds of appeal had been significantly refined. That being so I will move directly to consider the submissions of the parties insofar as they relate to such grounds.

Submissions on behalf of NUIG
36. Counsel for NUIG submits that in the High Court it was the prior professional engagement between Ms. Hughes and the complainant that formed the basis for Professor Nasheuer's complaint of objective bias. This was clear from the transcript of the hearing of the 21st July, 2017 and also from the letter sent on behalf of Professor Nasheuer to the Chief Operations Officer of NUIG on the 27th July 2017, the day before the proceedings issued in which there was no complaint that he had not been consulted concerning the terms of reference.

37. Counsel submits that at para. 21 of her judgment the trial judge rejected Ms. Hughes' past connection with the complainant as providing sufficient grounds to raise a reasonable apprehension of bias. He drew this court's attention to the fact that that finding is not the subject matter of any cross appeal. Accordingly, counsel submits that the prior professional engagment between Ms. Hughes and the complainant cannot be relied upon in any respect to support Professor Nasheuer's complaint of objective bias. He asks the court to note that it was the prior professional engagment between Ms. Hughes and the complainant that had triggered the proceedings rather than any refusal on the part of Ms. Hughes to consult with Professor Nasheuer regarding the terms of reference.

38. Insofar as the trial judge supported her conclusion that Professor Nasheuer had established facts sufficient to give rise to a reasonable apprehension of bias based upon the refusal of Ms. Hughes to permit him the opportunity to make what she described as a focussed argument relating to the antiquity of the incidents giving rise to the complaint, counsel submits that her decision in that regard was a ruling made by her in the course of the investigation itself and could not, for that reason, be relied upon to support a claim of objective. Bias, counsel submits, is not to be inferred from legal or other errors made within the decision making process. Rather, it is to be inferred from the existence of something external to the process itself. The fact that a procedural ruling had been made against Professor Nasheuer concerning the terms of reference was not evidence of bias. To fail to adopt the course proposed by a plaintiff did not give rise to the apprehension of bias. Counsel relied upon the decision in *Minnock v. Irish Casing Company Limited* [2007] 18 ELR 293.

39. Counsel also submits that the evidence did not support the trial judge's conclusion concerning objective bias based on Ms Hughes's refusal to permit Professor Nasheuer make a focused complaint regarding the antiquity of the complaints. Ms. Hughes had advised Professor Nasheuer by letter of the 19th May, 2017 that she would hear and consider any arguments that he wished to make to the effect that he had been prejudiced by delay in defending or addressing any complaint. This assurance had been communicated to Professor Nasheuer's solicitors long before they wrote on the16th June 2017, for the first time, seeking to meet with the investigator to address the terms of reference.

40. Counsel reminded the court that Professor Nasheuer had not been singled out from other respondents in terms of his entitlements. The terms of reference and the framework proposed were to be the same for all 9 respondents and the reasonable informed observer would be reassured by that fact.

41. Counsel submits that it is a regular feature of investigations of the nature under consideration that the complainant is consulted regarding the terms of reference. After all, it is their complaint that has led to the investigation. Counsel submits that there was no evidence from which the trial judge could reasonably have concluded that the failure to engage with Professor Nasheuer concerning the terms of reference could arguably be considered to be evidence of objective bias on the part of Ms Hughes. She had followed the Labour Court's recommendation. Further, Ms Hughes had made clear in correspondence and in the course of the hearing on the 21st July, 2017 why she had not consulted Professor Nasheur concerning the terms of reference. She had explained the circumstances in which she had consulted with the complainant and NUIG land had linked it to the procedure prescribed in the Labour Court recommendation. She had even clarified the extent of that interaction. There was, counsel submits, no evidence from which the trial judge could reasonably have concluded that the length of the list of issues in the terms of reference gave rise to an inference that had been extensive consultation between the complainant and Ms Hughes thus giving rise to a reasonable apprehension of bias. All of the evidence was to the contrary.

The respondent's submissions
42. Counsel for Professor Nasheuer submits that he is not debarred from relying upon the past professional engagement between the complainant and Ms. Hughes by reason of his failure to cross appeal the trial judge's conclusion that that relationship was not sufficient to support a reasonable apprehension of bias. He states that in the High Court he conceded that the circumstances surrounding that relationship on its own would be insufficient to support a reasonable apprehension of bias. Nonetheless, against the backdrop of that prior relationship, the decision made by the investigator not to consult with Professor Nasheuer concerning the terms

of reference was one which the trial judge was entitled to conclude gave rise to an apprehension of bias. In other words, counsel submits that whilst the past relationship between the complainant and the investigator of itself was not sufficient to reach the threshold at which bias might be apprehended, when allied to another factor such as the investigator's refusal to consult with Professor Nasheuer concerning the terms of reference, those two factors together could reach the appropriate threshold.

43. In the written submissions filed on behalf of Professor Nasheuer it is accepted that where it not for the past relationship between the complainant and Ms Hughes her failure to consult him would afford him no more than a fair procedures argument. However, that point became elevated to an apprehension of bias argument because of the prior relationship. In support of Professor Nasheuer's entitlement to rely upon the cumulative effect of factors which on their own could not give rise to a reasonable apprehension of bias reliance is placed on the decision of Hedigan J. in *O'Ceallaigh v. An Bord Altranais* [2009] IEHC 470 and [2011] IESC 50 and that of Sullivan J. in *R (Gardner) v. Harrogate B.C.* [2008] EWHC 2942.

44. The written submissions place considerable emphasis on the different treatment afforded by Ms. Hughes to the complainant and Professor Nasheuer. That difference would lead the reasonable observer to conclude that her refusal to hear Professor Nasheuer regarding the terms of reference might well have been influenced by her prior relationship with the complainant. The submissions make clear that the failure on the part of Ms. Hughes to hear Professor Nasheuer concerning the terms of reference will be advanced at the hearing of the action as a breach of fair procedures and / or breach of contractual right point but what he relies upon for the purposes of his complaint of objective bias is the failure of Ms. Hughes to treat him in the same manner as she treated the complainant.

The principles to be applied when considering a claim of objective bias

45. The within appeal centres upon the conclusion of the trial judge that Professor Nasheuer had, on the evidence before the court, established a serious issue to be tried concerning objective bias on the part of Ms. Hughes. That being so, it is appropriate to consider the principles which apply when a judge or adjudicator is faced with a recusal application based upon a complaint of objective bias. I am, of course, mindful of the fact that on the present appeal what the court must address is whether Professor Nasheuer had established a serious issue to be tried concerning objective bias, a lesser somewhat lesser threshold than that which would apply on a substantive hearing of the same issue.

46. The test for objective bias has been discussed at some length in a significant number of cases over the last decade. These include *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, *O'Callaghan and Ors v. McMahon and Ors (No. 2)* [2007] IESC 17 and [2008] 2 I.R. 514, *Goode Concrete v. CRH plc & Ors.* [2015] IESC 70 and *The Commissioner of An Garda Síochána and Ors v. Penfield Enterprises and Ors* [2016] IECA 141.

47. While the parties to this appeal are not in dispute as to the test to be applied by a court when considering a claim of objective bias it is no harm to reflect upon that test which was summarised in the following fashion by Denham C.J. in *Goode Concrete v. CRH plc & Ors.* at p. 54 of her judgment. This is what she said:-

> *"The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. It is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is possessed of all of the relevant facts."*

48. What is clear from the test thus formulated is that each case will necessarily turn on its own particular facts and in respect of each case the reasonable person, by whose standard the apprehension of bias is to be tested, is to be taken to be in possession of all of the relevant facts.

49. In *O'Callaghan & Ors. v. McMahon & Ors. (No. 2)* at para. 80 of his judgment Fennelly J. helpfully identified the principles which he considered relevant to the court's consideration of a claim of objective bias. This is what he said:-

> *"80. The principles to be applied to the determination of this appeal are thus, well established:*
>
> *(a) objective bias is established, 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;*
>
> *(b) the apprehensions of the actual affected party are not relevant;*
>
> *(c) objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*
>
> *(d) objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or show prejudice, hostility or dislike towards one party or his witnesses."*

50. Relevant also to a consideration of this issue are the potential adverse consequences of recusal applications. In his judgment in *Goode Concrete* Hardiman J. stressed the importance of locating this important issue within what he described as *"the overarching need to have a properly functioning system of justice, ensuring finality in the resolution of disputes"*. In so stating, he was clearly conscious of the fact that recusal applications have the potential to disrupt the orderly conduct and management of litigation or the progress of an investigation with significant adverse affects for those involved. That fact notwithstanding, the court's obligation to ensure that proceedings are conducted in a timely and efficient manner can never trump the requirement that justice be done particularly where there is a concern regarding the impartiality of the decision maker.

Discussion

51. It is clear from the correspondence which immediately pre dates the injunction application and the transcript of the hearing before the investigator on the 21st July, 2017 that the focus of Professor Nasheuer's claim of objective bias was the prior professional engagement between the investigator and the complainant in 1996. Whilst that engagement was not the sole evidence upon which he relied to support his application to restrain Ms. Hughes from further investigating the complaints against him, it is clear from the manner in which the High Court judge addressed this issue in her judgment that it was the first of what she considered to be two factors relied upon to support his claim of objective bias.

Prior engagement between the complainant and Ms. Hughes

52. The High Court judge stated in unequivocal language that she considered that the prior professional engagement between the investigator and the complainant did not provide Professor Nasheuer with a basis upon which he might reasonably claim there was a serious issue to be tried concerning objective bias. That being so I am sympathetic to NUIG's submission that, absent any cross appeal from that finding, Professor Nasheuer is should not be entitled to invoke that relationship to support the other factor upon which he seeks to rely when seeking to uphold the trial judge's finding that he had established a serious issue to be tried concerning objective bias.

53. On the other hand, counsel for Professor Nasheuer has assured the Court that in the court below he never contended that the prior professional relationship between the investigator and complainant, of itself, was sufficient to establish that there was a serious issue to be tried concerning objective bias. He states that he relied upon a number of factors to take him to the necessary threshold and that the prior relationship between the investigator and the complainant was but one such factor. Thus he maintains that he should be entitled to rely upon the prior relationship between the complainant and Ms Hughes to further the same submission on this appeal. This argument as advanced by counsel, to me, sits comfortably with the written submissions filed on behalf of Professor Nasheuer wherein it is accepted that where it not for the past relationship between the complainant and Ms Hughes her failure to consult him would afford him no more than a fair procedures argument. Accordingly, I am of the view that it would be unjust to preclude counsel for Professor Nasheur from seeking to rely upon the past professional relationship between the complainant and Ms Hughes to support or elevate his claim of objective bias based on her failure to consult Professor Nasheur concerning the terms of reference.

54. There is a further slight complication with the approach now proposed by counsel for Professor Nasheuer. The High Court judge in coming to her conclusion that Professor Nasheuer had established a serious issue to be tried in respect of objective bias appears to have done so based upon the fact that he was not afforded equal treatment to that of the complainant when it came Ms Hughes fixing the terms of reference. I can find nothing in her judgment to suggest that in coming to that conclusion she attached any weight to the prior relationship between the investigator and the complainant. In other words, the prior relationship between the investigator and complainant was not one of a number of factors which when considered cumulatively had led her to conclude that Professor Nasheuer had made out a serious issue to be tried in respect of objective bias.

55. Notwithstanding the objection of NUIG and the reservations earlier expressed, in circumstances where counsel for Professor Nasheuer contends that it is not clear from the judgment that the trial judge discounted the prior professional relationship when she concluded that Professor Nasheuer had established a serious issue to be tried concerning objective bias, I will address whether that relationship and Ms Hughes's failure to hear Professor Nasheuer concerning the terms of reference could as a matter of fact and/or law when considered seperately or cumulatevely have provided her with a reasonable basis to conclude that a serious issue concerning objective bias had been made out. Given that I have decided to take this approach, it is necessary to engage first with the circumstances in which a past professional relationship of the type under consideration here may give rise to a reasonable apprehension of bias.

56. Whilst each case must turn upon its own facts significant guidance as to when a past professional relationship may give rise to a reasonable apprehension of bias is to be found in the case law to which I have earlier referred. Of particular assistance are the judgments of Denham and McGuinness JJ. in *Bula Limited v. Tara Mines Limited (No. 6)*.

57. In *Bula*, the applicants, Bula Limited (in receivership), Bula Holdings, Richard Wood and Michael Wymes appealed a High Court judgment to the Supreme Court. They were unsuccessful. The appeal was heard by Hamilton C.J., Barrington J. and Keane J. They later applied to have that judgment set aside on the grounds of objective bias. They alleged that Barrington and Keane JJ. had links with the respondents which were of such a character as to give rise as to a perception of bias. Barrington J. had acted for the 15th respondent in two sets of proceedings relating to the Tara respondents in one case and the applicants in another. He had also advised on legislative reform in the area of mineral mining. In addition he had acted against the Tara respondents in another case and had prepared two sets of advices for the first respondent. Keane J. had advised the first respondent as to an exempted development under the planning legislation and had undertaken to appear for the first respondent in an anticipated hearing before An Bord Pleanála. In the end of the day he had not done so because events were overtaken when he was appointed a judge of the High Court.

58. The appellants contended that the aforementioned connections, which were seventeen in number, when considered individually and/or cumulatively were sufficient to give rise to a reasonable apprehension of bias such that the judgment should be set aside.

59. Whilst the aforementioned decision relates to concerns expressed by the appellants that two of the judges on the court that had decided their appeal had, at an earlier time in their career acted, inter alia, for one or more of the parties, the reasoning of Denham J. and McGuinness J. in their respective judgments applies with equal force to the facts of the present case.

60. As to the knowledge to be imputed to the reasonable and fair-minded observer concerning the nature of the relationship between a barrister and his or her client, a relationship much the same as the prior professional relationship between the complainant and investigator in in the present case, McGuinness J. considered the following statement by Merkel J. in *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* [1996] 135 ALR 753 to be particularly helpful.

> *"In seeking to approach the matter on the basis of the principles established in the cases I have referred to, the 'informed' observer, when examining the association in the present case, can be assumed to do so with the presumed general knowledge that:*
>
> > *(a) when barristers act on a client's behalf they do so in a professional capacity as their client's legal advocate selected to act in the case for that purpose. Any barrister so selected could have been briefed to fulfil the same task for the opposite side;*
> >
> > *(b) in accepting a brief to act for a client in a particular commercial case, the barrister does not become part of or identified with the client and has no direct or indirect financial interest in the outcome of the case;*
> >
> > *(c) the barrister acts as such as a member of an independent bar. The barrister is instructed by a solicitor or a firm of solicitors to present the client's case and in doing so is bound by a professional code of ethics ensuring that the barrister's conduct is in accordance with his or her professional standards;*
> >
> > *(d) it is common place for barristers who are close associates, or friends and who may even be from the same set of chambers, to fight on opposite sides in a case without compromising their professional duties to act in the interests of their clients;*

(e) as judges are usually appointed from the senior ranks of the profession, particularly the bar, it is likely that they will be well acquainted, and have formed close associations, with senior counsel appearing before them. It is also likely that they will have personal and professional associations with many of the counsel appearing before them."

61. Pausing for a moment to consider how this guidance is of assistance in the present case, I would observe that the complainant did not, as might ordinarily prevail in such circumstances, select Ms. Hughes to act on her behalf in her complaint against a NUIG in 1996. Ms Hughes only became involved because the trade union official who had initially agreed to act on her behalf was unwell, thereby further diluting the relationship between the complainant and the investigator.

62. Further, in my view, because Ms Hughes had no direct or indirect financial interest in the outcome of the complainant's claim against NUIG in 1996, there is no reason why the reasonable fair-minded objective observer would apprehend that Ms Hughes might be biased in favour of the complainant in the current investigation, not least given the long lapse of time in the interval. They would surely understand that it was Ms. Hughes's job as a trade union representative to represent the union's members and that this relationship would not impact on her capacity to be impartial when adjudicating on a dispute involving a former client twenty years later.

63. Ms Hughes's prior relationship with the complainant can conveniently be likened to that which exists between a barrister and a client for whom they act on one occasion. Paragraph 4 of the headnote from the judgment in *Bula* provides an apt summary of the nature of such relationships more fully canvassed by Denham J. in the course of her judgment.

"4. That barristers were independent and did not become espoused to a litigant's ambitions in providing the litigant with legal services. The reasonable person would be aware of that. A prior relationship of legal advisor and client did not generally disqualify the former advisor on becoming a member of court sitting in proceedings to which the former client is a party. There must be additional factors establishing a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. A long, recent and varied connection may disqualify a judge. A reasonable apprehension would also arise where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court."

64. Relevant also in the context of the aforementioned summary is the fact that in the present case there was, as earlier observed, no cogent or rational link between the past professional association between the investigator and the current complainants made by the complainant which could have any bearing upon the issues to be determined in the investigation.

65. In reliance upon the decision in Bula it can also be assumed that the reasonable fair-minded observer would understand that, having regard to the time that had elapsed between 1996 and the date of her appointment, any influence arising from the investigators prior profesional association with the complainant would have greatly diminished. The following is what McGuinness J. had to say concerning the effect of the passage of time on the apprehension of the reasonable informed observer :-

"[That]of great importance to the reasonable person would be the fact that the events under scrutiny took place so long ago i.e. at least twenty and in some cases nearly thirty years ago. The reasonable person would realise that Barrington J. would be unlikely to have had a clear memory of the work he did that far back, let alone be influenced by it."

66. Having regard to the aforementioned guidance it is perhaps not unsurprising that counsel for Professor Nasheuer has accepted the trial judge's finding that the past relationship between the complainant and the investigator could not give rise to a reasonable apprehension of bias. The question then to be addressed is whether, having concluded that the informed observer would not apprehend bias as a result of the prior professional relationsip, it should be imputed that they might reconsider the benign nature of that relationship so as to apprehend bias because of some other wholly unconnected factor? Before addressing this question I will first consider as a stand alone issue what I consider was the basis upon which the High Court judge decided that Professer Nasheur had established a serious issue to be tried concerning objective bias.

Failure to consult with Professor Nasheur concerning the terms of reference

67. It is to be remembered that the test for objective bias does not invoke the apprehension of any party but the reasonable apprehension of a reasonable person who is possesed of *all of the relevant facts* (my emphasis). Such concerns as Professor Nasheuer may have concerning potential bias on the part of Ms Hughes are not material to the court's assessment.

68. Having considered all of the evidence submitted to the High Court judge, I am satisied that, concerning the terms of reference and Ms Hughes's engageent with the complainant prior to finalising those terms of reference, the informed observer must be taken to know of and understand all of the following relevant facts:-

1. that Ms. Hughes was appointed to carry out the investigation by the Labour Court as a result of its recommendation of the 18th day of October 2016 and that the complainant was not consulted prior to her nomination;
2. that the Labour Court decision required Ms Hughes to consult with the complainant and NUIG concerning the terms of reference and the scope of the investigation. The procedure did not provide for any consultation with the respondents concerning these matters;
3. that under the procedure advised by the Labour Court the Investgator was to be the sole and final arbiter of the terms of reference. The investigator did not require the agreement of the complainant, NUIG or the respondent to the terms of reference.
4. that Ms Hughes had, in accordance with the procedure advised by the recommendation of the Labour Court, consulted the complainant and NUIG concerning the terms of reference after which she had determined the terms of reference and the scope of the investigation.
5. that the Labour Court on being advised of Ms Hughes's past professional involvement with the complainant, having considered the matter, was satisfied that she was an appropriate person to carry out the investigation.
6. that the complainant and NUIG had been given the opportunity to comment on the terms of reference which were then decided by her alone.
7. that Professor Nasheuer was afforded the opportunity to comment on the methodology to be adopted by the investigators.
8. that the procedure advised by the Labour Court required the investigator to adopt procedures that were fair and which complied with the rights of complainant and respondents to natural justice.
9. that Ms Hughes had confirmed in writing that she would, in the course of the investigation, consider any argument advanced by the respondents based upon prejudicial delay;
10. that the procedure advised by the Labour Court, which did not require consultation with the respondents concerning

> the terms of reference, was in accordance with that provided for in the University's own Staff Anti –Bullying Policy. Had the complainant's complaint been dealt with under that procedure Professer Nasheuer would not have been entitled to be consulted as to the terms of reference.

69. Given that the fair minded observer is to be taken to be in possession of all relevant facts, he/she must be treated as a person who would have had sight of the terms of reference, the decision of the Labour Court, the transcript of the meeting of the 21st July 2017 and all of the corespondence and other douments produced on the High Court application.

70. Armed with knowledge of all of the aforementioned facts I cannot see how the reasonable and fair-minded observer could reasonably apprehend bias on the part of Ms Hughes because she refused to afford Professor Nasheuer the opportunity to make submissions concerning the terms of reference and, in particular, a submission confined to the antiquity of the complaints. The informed observer would understand that he had no entitlement to be treated in the same manner as the complainant regarding the terms of reference and that in such circumstances no bias could be imputed to the decision of Ms Hughes not to consult him on the matter. This is particularly so in circumstances where Ms Hughes had both orally and in writing spelt out precisely why she had refused his request. Further, the independent observer in this case would have been in a position to verify as correct all of what Ms Hughes had said in support of her decision given that he/she is to be considered to have knowledge of all of the relevant facts which would include the information contained in the documents and correspondene forwarded to Professor Nasheuer and also what was said by Ms Hughes at the meeting of the 21st July 2017.

71. The reasonable and fair-minded observer would, in my view, clearly understand that there was nothing irregular or suspicious about the procedure advised by the Labour Court and adopted by Ms Hughes just because it did not provide for consultation with the respondents concerning the terms of reference. This would have been obvious from NUIG's own Staff Anti –Bullying Policy which afford alleged wrongdoers no such entitlement, a fact that was made known to Professor Nasheuer in correspondence. Further, the reasonable and fair-minded observer would know that Professor Nasheuer had been afforded precisely the same entitlement as the complainant and the University to make observations concerning the methodology to be deployed in the course of the investigation. Also, knowing that what Professor Nasheuer had wanted to addresss with the Investigator was the antiquity of the complaints, the reasonable fair-minded person would also, I believe, have been further comforted by the assurance given by Ms Hughes both orally and in writing that any argument he wished to advance conerning the antiquity of the claims would be considered by her in the course of the investigation. That knowledge would surely have allayed any apprehensions that they might harbour that Ms Hughes's refusal to meet him about the terms of reference was indicitave of bias against him. I am also satisfied that they would understand the position adopted by Ms Hughes when she stated in correspondence that to have agreed to meet with Professor Nasheuer concerning the terms of reference would have been to mislead him as to his entitlements.

72. Given that the reasonable fair-minded observer would not apprehend bias on the part of Ms Hughes due to her refusal to consult with Professor Nasheur concerning the terms of reference or by reason of the fact that she had consulted with the complainant prior to deciding upon the terms of reference, I am satisfied that he/she could not reasonably apprehend bias on the part of Ms Hughes by reason of the length of the list of items to be investigated.

73. As is clear from her judgment, the trial judge concluded that the reasonable fair-minded observer might, from the length of the list of items to be investigated, suspect that there had been very significant engagement between Ms Hughes and that this was to be contrasted with how Professor Nasheuer had been treated. It was this inequality of treatment that in her view might cause a reasonable fair-mined oserver to apprehend bias on the part of Ms Hughes. In my view, such apprehension could only be considered reasonable if Professor Nasheur enjoyed the same right as the complainant to be heard concerning the terms of reference and if it could also reasonably be inferred from the length of the list of items to be investigated that Ms Hughes had had extensive engagement with the complainant. In my view, the reasonable fair-minded observer in possesion of all the material facts in this case would know from what Ms Hughes had told Professor Nasheuer that her involvement with the complainant had been minimal and that she alone had decided the terms of reference. Thus apprehension imputed to the informed observer based on a concern that there had been extensive engagement between the complainant and Ms Hughes, was not supported by the evidence.

74. The evidence as to the engagement between Ms Hughes and the complainant was that the complainant and NUIG had been given what might be classified as no more than a fairly perfunctory input into the terms of reference. The nature and extent of engagement is captured in the following exchange between counsel for Professor Nasheuer and Ms. Hughes at the meeting of the 21st July 2017;

> "Counsel: Just to be clear, that's Ms. A (the complainant) and the University were given the opportunity to comment on the terms of reference?
>
> J.H.: It is probably a little less than that but they were consulted, I would say they were consulted. I would say that's not necessarily the agreement of the few (sic) of the parties either. You will appreciate I am not really in a position to talk about Ms. A's input into this but I do not want some impression abroad that in someway either the University or Ms. A decided, or agreed, the terms of reference."

75. Having reviewed the inter partes correspondence and the transcript of the meeting of the 21st July 2017, knowledge of the content whereof must be imputed to the reasonable and fair-minded observer, I am fully satisfied that they would not apprehend that the complainant had influenced the terms of reference. This was confirmed as a fact by Ms Hughes as is clear from par.11 of the aforementioned transcript.

76. In circumstances where Ms Hughes (i) made known that her engagement with the complainant and NUIG concerning the terms of reference was minimal (ii) had explained why she had consulted with the complainant and refused to consult Professor Nasheuer concerning the terms of reference and had linked her actions to the procedure prescribed by the Labour Court (iii) had clarified that any submission that Professor Nasheuer wished to advance concerning the antiquity of the complants made would be considered by her in the course of the investgation, the reasonable fair-minded observer in possesion of all of the facts, could not, in my view, have apprehended bias as a result of any aspect of Ms Hughes's conduct concerning the tems of reference.

77. For the aforementioned reasons I am satisfied that the trial judge erred in law and in fact in holding that the failure on the part of Ms. Hughes to consult with Professor provided a valid basis for her conclusion that Professor Nasheur had made out a serious issue to be tried concerning objective bias.

78. Given that I have reached the aforementioned conclusion it is perhaps unnecessary for me add that I also consider the decision made by Ms. Hughes to refuse Professor Nasheuer's request to be heard in relation to the terms of reference was one made by her within the investigation itself and should therefore not be considered as one capable of giving rise to a complaint of objective bias (see for e.g. Minnock v. Irish Casing [2007] 18 ELR 22).

Cumulative effect of apprehension of bias
79. The question then remains as to whether the two principal factors to which I have earlier referred and discounted as giving rise to a reasonable apprehension of bias; namely the prior professional relationship between the compalinant and Ms Hughes and the failure to afford Professor Nasheuer equal treatment in respect of the terms of reference, can when considered cumulatively be said to raise a serious issue of objective bias in these proceedings. I should, however, here restate that I do not accept that this is what the trial judge did in the present case. I believe she discounted entirely the past professional relationship between Ms Hughes and the complainant but relied upon a number of matters concerning the terms of reference as the basis for her conclusion that Professor Nasheur had established a serious issue to be tried in relation to objective bias.

80. There may well be cases in which the courts have considered in greater detail than I intend to do now the circumstancs in which an accumulation of factors, which individually do not give rise to an apprehension of bias, have collectively been deemed sufficient to raise such an apprehension. Suffice it to state that I do not consider the cases cited in the submissions filed on behalf of Professer Nasheuer sufficient to reach such a conclusion in this case. On the facts of this case I find myself coming to a similar conclusion as tht reached by Denham J.in Bula when she said, concerning four of the seventeen links which the applicants had argued should be considered cumulatively, "Four noughts are still nothing". In this case I would say two noughts are still nothing.

81. The first judgment relied upon in support of Professor Nasheuer's entitlement to accumulate factors which individually would be considered insufficient to raise a reasonable apprehension of bias is that of *O'Ceallaigh v. An Bord Altranais* [2009] IEHC 470. Whilst it is correct, as was stated in the written submissions filed on Professor Nasheur's behalf, that Hedigan J. stated that the circumstances which may give rise to objective bias are not closed, there is nothing specific in his judgment to support the principle proposed.

82. In *O'Ceallaigh* the chairperson of the Fitness to Practice Committee of An Bord Altranais, Ms. Treanor, was asked to recuse herself from sitting on an inquiry into the conduct of Ms. O'Ceallaigh, a midwife. She was asked to do so on the grounds that one of the expert witnesses to be called in support of the misconduct alleged was a Ms. Hanrahan. Ms. Hanrahan was the Director of Midwifery at the Rotunda Hospital and Ms. Treanor was the Group General Manager at the same hospital. Ms. Hanrahan did not, however, report to Ms. Treanor and there was no line management connection between them. That being so, Hedigan J. declined the relief sought by Ms. Ceallaigh, a decision upheld by the Supreme Court on appeal.

83. Neither am I convinced that the decision in *R (Gardner) v. Harrogate B.C.* provides clear authority for the argument advanced. In that case the court was dealing with an application for judicial review to quash an order made concerning a planning permission made in favour of a Mr & Mrs Atkinson.

84. Mrs. Atkinson had been a Conservative Borough Councillor since early 2002. She obtained planning permission for a particular development in the face of an emphatic report from a planning officer advising that the application should be refused. The application turned upon the casting vote of the Chairman, a Councillor Simms, who was also a Conservative Councillor. As it happens, Mrs. Atkinson made a further application for planning permission in respect of an adjacent site the following year and on that occasion Councillor Simms declared a prejudicial interest and left the meeting after which the application was refused.

85. Following a complaint to the local government Ombudsman an investigation took place into the aforementioned planning process. The Ombudsman was concerned that the planning decision in favour of Mr and Mrs Atkinson had issued in circumstances where the fair-minded and informed observer with knowledge of the facts would conclude that there was a real possibility of bias. Based upon the Ombudsman's report the Council considered that the only way to rectify the situation was for the Council itself make an application to quash the planning permission in light of the report of the local government Ombudsman.

86. It is true to say that in the course of his judgment Sullivan J. noted eight factors which the Council had relied upon either individually or cumulatively to demonstrate the existence of apparent bias. Further, it is to be inferred from his judgment that he accepted that the court could look at the cumulative impact of the factors relied upon by the council.

87. It is however necessary to look at the factors which the court looked at cumulatively in *Gardner*. All of them concern the relationship between Councillor Simms and Mrs. Atkinson. For example, one factor was that they were both Conservative councillors. A second was that they shared transport to and from council meetings. A third was that they had social contact outside the council. A fourth was that they corresponded regarding certain planning matters. Indeed, the eight factors were all destined to demonstrate that there was a relationship of a personal and professional nature between Mrs. Atkinson and Mr. Simms such that Mr Simms should, in the opinion of Sullivan J. have stood down on the first planning application as he had done on the second.

88. The facts in *Gardner* are very different from those that present in the present case. All of the factors which the Council sought to accumulate related to the single issue as to whether the relationship between Mr Simms and Mrs Atkinson was sufficiently strong both personally and professionally to raise a reasonable apprehension of bias in the mind of the fair minded informed observer. That is quite different in my mind to seeking to accumulate unrelated issues which individually would not raise a concern of objective bias particularly in circumstances such as arise in the present case where the issues it is sought to accumulate are separated by as much as twenty years.

89. There may well be cases in which the courts have relied upon an accumulation of factors so as to conclude that the reasonable and fair-minded observer would apprehend bias, even if it be the case that the court was satisfied that if considered individually the factors would not have raised such as apprehension. However, even if that be so and the approach urged by counsel on behalf of Professor Nasheuer is regarded as permissible, I am satisfied that the reasonable and fair-minded observer with full knowledge of both relevant factors, i.e. (i) of all of the circumstances concerning the prior professional relationship between the complainant and Ms Hughes and (ii) her dealings with the complainant and the respondent concerning the terms of reference, could not reasonably apprehend of bias such that the court could conclude that Professor Nasheuer had made out a serious issue to be tried concerning objectvie bias.

Conclusion
90. It is understandable that any person, professional or otherwise, faced with an investigation into allegations of bullying made against them is likely to be highly sensitive to any indications, however remote they may be, that the person charged with the conduct of the investigation might be biased in favour of the complainant. To that extent, therefore, the concerns of Professor Nasheuer upon learning that Ms. Hughes had previously acted for the complainant – if only briefly and then twenty or more years ago - were perfectly understandable and they needed to be allayed in a satisfactory manner. After all, any such allegations, if established, have the potential, even at the lowest end of the bullying spectrum, to cause very significant damge to the alleged wrongdoer's personal and professional reputation. To say that judges are acutely aware of the concerns of persons against whom such allegations are made and the consequences for them of an adverse finding is an understatement.

91. It is for these very reasons that the legal principles to which I have earlier referred exist. They are intended to provide the litigant, or as is the case here, a party against whom acts of bullying and harrassment have been alleged with a robust safeguard against the risk of having those claims determined in an unfair process by a decision maker who may be biased. Human nature being as it is, a party to litigation concerning such matters or a professional against whom a colleague has made such allegations is likely to be highly sensitive to everything which touches, even remotely, upon their own case particularly if it does not appear to be in accordance with their hopes and expectations. The same can be said of their lawyers in most instances, and that is not to be taken as criticism.

92. It is precisely because of the subjective manner in which someone like Professor Nasheuer is likely to view the conduct or a decision made by the investigtor charged with investigating the complaint made against them that the test to be deployed by a court when faced with a claim that the judge or investigator wrongfully refused to stand aside when asked to do so, is an objective one, namely; would the reasonable and fair-minded observer with full knowledge of all of the facts apprehend bias on the part of the proposed ajudicator?

93. In the circumstances of this case Professor Nasheuer and his legal advisors clearly considered that Ms Hughes, for the reasons earlier identified in this judgment, should have acceeded to the application made to her to stand down as Investigator.

94. Whilst the trial judge in her carefully considered judgment on the interlocutory injunction application concluded that Professor Nasheuer had established a serious issue to be tried concerning objective bias, for the reasons earlier advanced I have come to the view that she erred in law and in fact in so doing.

95. Having concluded that Professor Nasheuer did not establish that there was a serious issue to be tried concerning objective bias it follows that the order made by the High Court judge staying the investigative process must now be discharged.

96. For all of the aforementioned reasons I would allow the appeal.