**PA-205710**
**History Item Number 0062**

*This note is not a verbatim account of my conversation with Mr Still but it does capture the main points.*

I tried to telephone Mr Still at 10.15am. Mr Still said he had just woken up and asked if I could call back later. I asked if an hour would be ok and Mr Still confirmed that was fine.

At 11.15am, I called Mr Still again. I introduced myself, explained where I was calling from and explained that I wanted to discuss his complaint to our office. I asked if now was a good time and Mr Still explained that it was.

Mr Still began to talk about his experience with our office so far. He said it had been a year since he had complained to us. He said that his complaint had ended on 27 October and he had emailed Mick Martin. Mr Still said he had then had an email from Gillian Hodgson. He said that he asked for a copy of his documents back and he had then received a copy of the Visual File. Mr Still said he was not stupid and every time he came to us we changed the reference. He said he had asked for a meeting and that explaining his complaint would only take five minutes. Mr Still said that the last person he had spoken to was Samantha McIntosh and she gave him his reference number. Mr Still said he had dealt with 17 different people in total. I acknowledged Mr Still's comments about the service he had received and I apologised for that. Mr Still said that he wanted to come to Manchester to meet with me and someone senior because his experience so far had been shoddy. I explained that it was not my role to look at the service he had received from our office, my role was to investigate his complaint.

Mr Still said that his human rights had been breached because a judge had changed his case to a direct discrimination case. He said he had told them all that, he was not stupid and he was not going away. Again I explained that I could not get involved in his complaint about other members of staff. I explained that my role was to investigate his complaint about the EHRC. I said that if he wanted to complain about members of the Ombudsman's office, he could contact the Customer Care Team and I would be happy to pass him the details. Mr Still said he had already been through everyone and he would just email Mick Martin.

Mr Still said he had asked on a number of occasions what he complaint was about but nobody had answered that. He said that that was why he wanted a meeting with us. I said I would not commit to a meeting now as I did not think it was necessary. I said that we would discuss his complaint over the telephone and if anything was unclear, we might consider a meeting then. Mr Still said he wanted a meeting, he had waited a year. I said that I understood he was dissatisfied with our office. Mr Still said that he was not asking us to look at his complaint about the court of Human Rights, and the judges. Mr Still reiterated his request for a meeting. Again he explained he had seen the Visual File and that he had been given a different reference number. Mr Still said that our office had made his life a misery. I said I was very sorry to hear that. I asked if there was a reason why Mr Still needed to meet instead of discussing his complaint over the telephone. Mr Still said he wanted a meeting and was willing to travel to Manchester. He said he would not have had a call from Gillian Hodgson. Again I reiterated that I could not look at these issues for Mr Still.

I explained to Mr Still that we had proposed to accept his case for investigation. I asked if we could move on to discuss his complaint and Mr Still agreed. I said that I understood Mr Still's complaint was about poor advice he had received from the EHRC. Mr Still said that that was not true. He said he had never complained about that and he had told us that a million times. I said I would make a note of that. I said I also understood that Mr Still had complained that the EHRC had not offered him assistance. Mr Still said he had never complained about that. In light of Mr Still's comments here, I asked Mr Still to tell me what he had complained about.

Mr Still said that his complaint had started on 14 October, and he had had an email on 29 October and the complaint ended on 30 October. He said that he had an employment tribunal claim against his former employer which he was intending to complain to the Court of Human Rights. He said that the judge at the tribunal had changed his complaint to a claim of direct discrimination. He said that the hearing was scheduled for four days but he had already been beat before he went in because she had changed the claim. Mr Still said he never could have won. He said he asked for a written judgement which he received but this said nothing about the change in his claim. Mr Still said he had then gone to the Employment Appeals Tribunal but was told that he did not have a case. He said he had approached a solicitor but they had told him that the Scottish justice system was corrupt. He said he had had to do everything himself. Mr Still said he had tried to kill himself around that time. I said I had read that and was sorry to hear it. Mr Still said it was ok.

Mr Still then moved on to talking about Irene Henery at the EHRC. He said that he had asked them to help him with his legal case but they had said they could not help. I asked Mr Still if he had asked them to help with his case against Tesco or with the issues surrounding the tribunal. Mr Still said he had asked them to help with his legal case about Tesco. Mr Still said he had tried to kill himself again at that stage. I asked Mr Still if his complaint then was about the EHRC's decision not to assist him with his claim against Tesco and Mr Still confirmed that that was correct. He said it had been going on for years but he had never complained to us about Tesco. I said I understood that. I said that from what he was telling me, I understood he was complaining that the EHRC did not help him and he said that was right.

Mr Still said he had wanted his MSP to investigate the corrupt judges involved in this case and he had contacted Alex Salmond. Mr Still said he had wanted to go to the court of Human Rights. He returned to talking about Irene Henery and said that she had violated his human rights. I asked why and Mr Still said that she had failed to help him. He said he had had an email from Irene Henery on 16 November saying they would not help him and he had asked a few questions. Mr Still said it was all in the emails. Mr Still said he had asked for a meeting with Irene Henery and his mental health advocate but that had not taken place. Mr Still reiterated that he had never complained about the advice given by the EHRC and I said I would amend the scope of his complaint.

Mr Still said he wanted the court of Human Rights to say to the Ministry of Justice that he should be allowed to appeal. He said that all of the judges were still sitting.

I brought Mr Still back to discussing his complaint about the EHRC. I reiterated to Mr Still that we would be investigating his complaint that the EHRC did not help with his claim. Mr Still said that was right. He said that the case had been through 3 or 4 case managers and a few reviews and they were still violating his human rights. I explained that though I

could see that these issues were all linked, I understood that Mr Still just wanted us to look at the EHRC's decision not to help him with his claim. Mr Still confirmed that that was the case.

I tried to ask Mr Still about the impact and he said that he could not get help from anywhere else. He said his right to an appeal had been ended and he wanted to be put back in the position he had been. Mr Still said that the judges involved were paid around £200k per year and he had claimed £3 million. Mr Still said that he had a pension claim too which was connected. I said that had been referred to the Pensions Ombudsman and Mr Still confirmed that. He said the court of Human Rights should have said to them too about looking at the matter. Mr Still said he wanted the court of Human Rights to consider his case. I explained that that was not a matter for us and I explained our investigation. Mr Still said he appreciated that but he wanted to get back at those involved in the case.

I told Mr Still that I wanted to explain the investigation process. Mr Still asked if we could look at the Disability Discrimination Act, and he said that we needed to start with the judgement that was made. I said that we could not do so in this case, that our role would only to be to consider whether the EHRC had done what they should have done in relation to helping Mr Still. He said this was a complex legal case and we needed to talk to a lawyer.

I explained the process which our investigation would follow. I said that we would write to Mr Still and the EHRC today to confirm our investigation. I said that I would then go through all of the papers that Mr Still had sent us and find out what the EHRC had done. I explained that we needed to know what the EHRC should have done in this case, and we would compare that with what they actually did. I said we would look to see if the EHRC had done anything wrong and explained that this was known as 'maladministration' and that if something had gone wrong, we would look at how Mr Still had been affected.

I asked Mr Still if he was still using a mental health advocate. He said that they had last received correspondence some time ago. I said that if Mr Still wanted, we could send them copies of the draft report and correspondence, but we would only do that at Mr Still's request. Mr Still said we did not need to, we could just send it all to him. I said that was fine.

I returned to speaking about the process, in terms of going through the file. He said he had sent information to Arif Dalvi and referred to Arif as a 'muppet'. Mr Still said we needed to speak to a lawyer because the judge had changed his case. I said that I would not commit to speaking with a lawyer, because our starting point was to see what the EHRC did and what they were required to do. I said that if we needed to, we could speak to a lawyer but I would decide if that was necessary during the investigation.

Mr Still said he had joined PHSO the Facts. He asked if I had heard of them. I confirmed that I had and that I was aware that our office had had some contact with them. Mr Still said he had joined on Christmas eve.

I set out the process in terms of sharing draft reports and allowing time for comments. I asked Mr Still if he had any questions and he said no. He said he had just had enough. Mr Still returned to speaking about this complaint about our service. I acknowledged that that was important for Mr Still but said I thought we needed to keep that separate from

our investigation. Mr Still noted that I would not be looking at that. I said if Mr Still had no more questions, we would leave it there. Mr Still thanked me for my time. I thanked Mr Still for his time too and we ended the call.

16/6/11 DOCUMENT PRODUCED RESPONDENTS LEGAL REPRESENTATIVE



# LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

## [2008] UKHL 43

1800 *Disability discrimination*
1811.1 *Disability-related discrimination – reason related to disability*
1811.2 *Disability-related discrimination – others to whom reason does not apply*
1855 *Discrimination by others than employers – providers of goods, facilities, services or premises*

Disability Discrimination Act 1995: ss.22, 24

**The facts:**

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the

Section 22 of the Act, so far as material, provides:

"(3) It is unlawful for a person managing any premises to c criminate against a disabled person occupying those premise (a) in the way he permits the disabled person to make use of a benefits or facilities; (b) by refusing or deliberately omitting permit the disabled person to make use of any benefits or fac ties; or (c) by evicting the disabled person, or subjecting him any other detriment."

Section 24 of the Act, so far as material, provides:

"(1) ... a person ('A') discriminates against a disabled perso – (a) for a reason which relates to the disabled person's disa ity, he treats him less favourably than he treats or would tr others to whom that reason does not or would not apply ..."

**The House of Lords (Lord Bingham of Cornhill, Lo Scott of Foscote, Baroness Hale of Richmond (dissenti in part as to the reasoning), Lord Brown of Eat under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored t decision of the judge in the county court.**

**The House of Lords held:**

1811.1, 1811.2

**The Court of Appeal had erred in holding that t council's conduct in seeking possession of the f constituted unlawful disability discrimination.**

**(1) The correct comparator for the purposes s.24(1)(a) is a secure tenant of the council witho a mental disability who has sublet his property, a not a secure tenant who has not sublet his proper In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.**

**There is no point in asking whether a person h been treated "less favourably than others" if t reason why the disabled person was subjected the allegedly less favourable treatment cann apply to those "others". If a person has been d missed because he is incapable of doing his jo there is no point in making the lawfulness of l dismissal depend on whether those who are ca ble of doing their job would have been dismissed a person has been dismissed because he will absent from work for a year, there is no point making the lawfulness of his dismissal depend on whether those who will not be absent from wo will be dismissed. If a tenant has been given noti terminating his tenancy because he has sublet breach of the tenancy agreement, there is no po in making the lawfulness of the action taken by l landlord dependant on whether notice to q would have been served on tenants who had n sublet. Parliament must surely have intended meaningful comparison in order to distingui between treatment that was discriminatory a treatment that was not.**

**(2) In order for the alleged discriminator's "r son" to "relate to" the disability for the purposes s.24(1)(a), it is necessary that the discrimina knows of, or ought to know of, the disability, at t time of the alleged discriminatory act. Unless t discriminator has knowledge or imputed kno edge of the disability, he cannot be guilty of unla ful discrimination under the Act.**

**That interpretation is supported by the fact th s.25(1) provides that a claim based on unlawful d ability discrimination may be made the subject civil proceedings in the same way as any oth claim in tort, damages being recoverable. Th points towards a requirement of knowledge. Mo over, the grounds of justification specified in s.24 of the Act assume that the discriminator has kno**

Judicial Office
for Scotland

# Judicial independence

Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is not the private right of judges, but the foundation of judicial impartiality and is for the benefit of the public. It is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law.

Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making. Judicial independence thus characterises both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government.

For centuries, the independence of judges has been protected in several ways:

- judges are independent of the executive[1] and the legislature[2] and do not get involved in political debate;
- full time salaried judges cannot be removed from office without a motion passed or approval by the Scottish Parliament; and
- judges are almost entirely immune from the risk of being sued or prosecuted for what they do in their capacity as a judge.

[1] The Scottish Government
[2] The Scottish Parliament

The essentials of judicial independence are impartiality, integrity and freedom from interference. Independence is secured in part by the restrictions on removal from office and the immunity from being sued or prosecuted.

**Principle of separation**

In order for the decisions of the judiciary to be respected and obeyed, the judiciary must be impartial. To be impartial, the judiciary must be independent. To be independent, the judiciary must be free from interference, influence or pressure. For that, it must be separate from the other branches of the State or any other body. As far back as 1599, the Lord President of the Court of Session declared to James VI that the judges were independent of the King "sworn to do justice according to our conscience"[3].

The principle of the separation of powers of the State requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the executive and legislative branches of government. The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others. The Judiciary and Courts (Scotland (Act) 2008[4] enshrines judicial independence in law. It introduces a duty on Scottish Ministers, the Lord Advocate and members of the Scottish Parliament to uphold the continued independence of the judiciary, barring them from trying to influence the judiciary through any special access to judges.

Judicial independence is important for a fair trial, for adjudication of disputes, for respect for decisions and because the judges may have to decide disputes between the executive, the legislature and an individual or the public at large.

**Our legal system**

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. A judge's role is to make a decision between parties in a legal dispute, based on the facts of the case and the law that applies to the facts. The parties must accept the judge's decision as final, unless one of them appeals the judge's decision to a higher court.

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[3] Lord President Seton *Bruce v. Hamilton* 1599 extracted in *Selected Papers by The Rt Hon Lord Cooper of Culross: Lord Justice General and Lord President of the Court of Session*, Oliver & Boyd, Edinburgh, 1957

[4] http://www.legislation.gov.uk/asp/2008/6/pdfs/asp_20080006_en.pdf

**Judicial decision making**

Judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence. Judicial independence means that judges are not subject to pressure and influence, and are free to make good decisions based solely on fact and law.

**Judicial oath**

When judges are sworn in they take two oaths or affirmations. The first is the oath of allegiance and the second the judicial oath, these are collectively referred to as the judicial oath.

The judicial oath provides:

> "I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will."

In taking that oath, the judge has acknowledged that he or she is primarily accountable to the law which he or she must administer.

Judges themselves have to be vigilant to identify and resist any attack upon that independence, by whomsoever or by whatever means. The oath plainly involves a requirement to be alert to, and wary of, subtle and sometimes not so subtle attempts to influence judges or to curry favour. Moreover, a judge should be immune to the effects of publicity, whether favourable or unfavourable. That does not mean, however, being immune to an awareness of the profound effect that judicial decisions may have, not only upon the lives of people before the court, but sometimes upon issues of great concern to the public in general.

**How long can a judge remain a judge?**

Once a judge is appointed, he or she is eligible to be a judge until the age of retirement. The statutory retirement age is set by the Judicial Pensions and Retirement Act 1993, which came into force on 31 March 1995. All judges appointed to full-time judicial office after the Act came into force must retire from office at the age of 70.

A full time salaried judge may be removed from office only if unfit for office by reason of inability, neglect of duty or misbehaviour. A judge of the Supreme Courts of Scotland[5] may be removed from office only by Her Majesty on a recommedation made by the First Minister. The First Minister may make such a recommendation if (and only if) the Scottish Parliament, on a motion made by the First Minister, resolves that such a recommendation should be made. The First Minister can make such a motion to the Scottish Parliament only if a tribunal, constituted in terms of section 35 of the Judicary and Courts (Scotland) Act 2008, has provided the First Minister with a written report concluding that the judge in question is unfit and giving reasons for that conclusion. A sheriff may be removed from office only if a tribunal constituted under section 12A of the Sheriff Courts (Scotland) Act 1971 has provided the First Minister with a written report concluding that the sheriff is unfit and giving reasons. The First Minister must lay the report before the Scottish Parliament and may lay a statutory instrument before Parliament for the removal of the sheriff. Parliament may resolve not to allow the removal to take effect.

[5] The Supreme Courts of Scotland are the Court of Session and the High Court of Justiciary. A judge of the Supreme Courts is called a Senator of the College of Justice.

## 3. THE SIX *BANGALORE PRINCIPLES* THEMSELVES

3.1 These are stated in this way:

(1) Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

(2) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

(3) Integrity is essential to the proper discharge of the judicial office.

(4) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

(5) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

(6) Competence and diligence are pre-requisites to the due performance of judicial office.

3.2 It will be appreciated that there may be some degree of overlap as between guidance derived from one of these principles and that derived from another. However, that is inherent in the scope of the principles.

JUDICAL APPOINTMENTS BOARD (SCOTLAND)
JUDICARY AND COURTS (SCOTLAND) ACT 2008.

LADY ANNE SMITH. BOARD MEMBER
1st JULY 2008 cont 1st July 2011

PART-TIME SHERIFF APPOINTMENTS REC-
OMDATIONS TO SCOTTISH MINISTERS
REF - JABS/2011/36 - REF- JAB/2011/37 -
REF - JAB/2011/39,
(EMPLOYMENT TRIBUNAL JUDGE, SUSAN A CRAIG.
PART-TIME SHERIFF., SEPTEMBER 2011,)
(APRIL-2013, FULL-TIME SHERIFF -
CIVIC CENTRE, LIVINGSTON SHERIFF COURT,)
BOARD MEMBER JUDICAL APPOINTMENTS BOARD.
(SCOTLAND) LADY SMITH, INTERVIENED ETJ
SUSAN A CRAIG, JAN 2011 - 1 JULY 2011
PART-TIME - SHERIFF, FIRST MINISTOR
ALEX SALMOND., SEPT 2011, APRIL 2013,
RECOMMENDED SUSAN A CRAIG, TO QUEEN. FOR.
PART-TIME SHERIFF, THEN FULL-TIME SHERIFF
CURRENT ANNUAL SALARY - SHERIFF SUSAN A CRAIG.
= £128,000 +, (ETC S/111150/2010, PETER STILL v
TESCO STORES LTD + FOUR OTHERS, ET 19/8/2010,
Pactord judgment, Susan Acraig 22/07/2011)