



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr H Yang

**Respondent:** Amec Foster Wheeler Limited

## JUDGMENT

The claimant's application for reconsideration of paragraphs 1 and 2 of the judgment sent to the parties on 30 June 2017 is refused.

Paragraph 3 of the judgment will be reconsidered in accordance with a notice sent separately to the parties.

## REASONS

### The application

1. Judgment was sent to the parties on 30 June 2017. Paragraph 1 of that judgment declared that the claimant had not been unfairly dismissed. In paragraph 2, the judgment declared that the respondent had not discriminated against the claimant because of age. Written reasons ("the Reasons") were sent on 19 July 2017.
2. The claimant applied by e-mail dated 1 August 2017 for reconsideration, amongst other things, of paragraphs 1 and 2 of the judgment. The other aspects of the judgment are dealt with in a separate notice.
3. The application is lengthy and runs to 32 multi-level paragraphs. In the interests of proportionality I attempt to summarise the main points here:
  - 3.1 The credibility of the respondent's witnesses is undermined by the respondent's incorrect assertion that it had made an overpayment of £4,210.65 to the claimant.
  - 3.2 The claimant seeks further information about the percentage of employees made redundant in other selection pools.

- 3.3 The claimant disagrees with assertions made by various witnesses in their witness statements and orally at the hearing, as being contrary to information that the claimant has received from other colleagues.
- 3.4 Mr Codling's qualifications and experience meant that he is unlikely to have made a genuine mistake about the claimant's expertise being in "steam generation".
- 3.5 There was no note taker at the meeting referred to in paragraph 46 of the reasons.
- 3.6 The tribunal made an incorrect finding of fact (paragraph 49 of the Reasons) as to what was said at the CM2 meeting.
- 3.7 The tribunal made an incorrect finding (paragraph 56 of the Reasons) that the claimant did not ask for the CM4 meeting to be postponed.
- 3.8 The tribunal mistakenly believed that the claimant had not made submissions on the question of whether the claimant's score for Growth Potential was a proportionate means of achieving a legitimate aim.
- 3.9 The tribunal incorrectly found (Reasons paragraph 110) that the claimant had not said in the consultation process that the wrong people had assessed him.
- 3.10 The claimant highlights a number of pieces of evidence tending to suggest that it was unreasonable for Mr Habberley to conclude that the ONR work was speculative.
- 3.11 Mr Codling should have realised from the claimant's CV and timesheets that the claimant's expertise went beyond generating power from steam.
- 3.12 There was sufficient workload to retain the claimant in employment.

#### **Relevant law**

4. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. Applications for reconsideration must be made in accordance with Rule 71.
5. Rule 72 requires that an employment judge must consider any application under Rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.

#### **Conclusions on preliminary consideration**

6. I address each of the claimant's main grounds for reconsideration in the same format as set out above:
  - 6.1 It is too late for the claimant to raise any further challenge to the credibility of the respondent's witnesses. Had he wished to do so, the claimant could have asked questions of those witnesses about the assertion that he had received an overpayment. Such questions would have been allowed, provided that they were capable of being answered by the relevant witness.

- 6.2 The claimant asked Mr Habberley in cross-examination about the fate of employees in the lower-grade selection pools. Mr Habberley gave an answer which the tribunal accepted (Reasons paragraph 106). The claimant made no follow-up request for supporting documents during the hearing. It is too late for him to make such a request now.
- 6.3 The tribunal considered the evidence of each witness when making findings of fact, including points that the claimant made during cross-examination and in his final submissions. The detailed points which the claimant makes now about the accuracy of various statements will not cause the tribunal to alter its findings. We were unable to attach much weight to information that the claimant said he had received from anonymous colleagues.
- 6.4 We took into account Mr Codling's background when finding that he had probably used the phrase, "steam generation" to mean generating power from steam. As we have recorded in paragraph 37 of the Reasons, the claimant's skills and experience were obviously in this area and not in the field of making steam. We thought it was more likely that someone of Mr Codling's experience would use a loose phrase rather than completely misunderstand the claimant's CV.
- 6.5 The claimant is correct that Mr Codling was the note-taker. This detail would not cause the tribunal to alter its conclusions.
- 6.6 As to the claimant's sixth ground:
- 6.6.1 The tribunal considered carefully what findings it was able to make in relation to the CM2 meeting. The evidence highlighted by the claimant in his reconsideration application was taken into account, including the claimant's explanation for not having complained about his Growth Potential score.
- 6.6.2 There is one exception. The tribunal missed paragraph 50 of the claimant's witness statement which stated "the line manager of Respondent verbally stated that my future growth potential was limited in consideration of my age." Paragraph 49.1 of the Reasons was therefore incorrect to state that "the version put by the claimant does not appear in his own witness statement". It should be noted, however, that this was just one of many reasons for finding that Mr Bailey and Mr Codling had not made the alleged remark. In particular, the claimant had alleged two different versions of the conversation (see paragraph 49), there had been no insistence on the minutes being amended to reflect the comment, the claimant did not complain about his Growth Potential score, and we rejected the claimant's explanation for the absence of a complaint. The pattern of scores given to employees of different ages was also highly relevant.
- 6.6.3 There was no error in paragraph 49.1 so far as it relates to Ms Brewer's notes. The paragraph states, correctly, that Ms Brewer's notes do not reflect the version put by the claimant. The version which the claimant had put, and which we were unable to accept,

was that Mr Codling had made an admission that the low score was because of the claimant's age.

- 6.6.4 The tribunal did take into account Ms Brewer's note at page 160 of the bundle in reaching its conclusion. Ms Brewer did not refer to a remark by the claimant's line manager, but to a comment by Mr Bailey that "Growth Potential favours younger staff". This comment, we thought, might well have been made. Paragraph 49 records that we found it possible that Mr Bailey or Mr Codling mentioned that younger staff were more likely to achieve promotion.
- 6.6.5 It did occur to us that younger staff could be more likely to achieve promotion than older staff because, in general, they would be likely to be employed on lower grades. Younger employees would, therefore, be likely to have an advantage over older employees when being assessed against the Growth Potential score. The remark noted by Ms Brewer was a reflection of that advantage and the corresponding disadvantage to older employees. This is different, however, from saying that the claimant had been given a low score because of his age. We were aware that this was a complaint of direct, not indirect, discrimination. That is why we took care to examine whether Mr Codling had made the alleged admission that the low score had been because of the claimant's age. We found that he had not.
- 6.7 The claimant made submissions as to why, in his view, the low score for Growth Potential was incorrect and was linked to his age. He did not make submissions on whether the aim to be achieved by the Growth Potential score was legitimate, whether it served the required social policy objective, or whether there were less discriminatory means of achieving that aim. In any event, consideration of the justification defence would only arise if the less favourable treatment of the claimant was because of age. We found that it was not.
- 6.8 The claimant is correct to point out that, at the CM3 meeting, he asked whether there was an external panel review for the claimant's scores. This is not the same as arguing that his initial scoring had been done by the wrong person. In any event, paragraph 110 of the Reasons makes clear that our finding about the absence of a challenge from the claimant was only one of a number of points in explaining why we came to our conclusion. For completeness' sake, I would add that it would only be in rare cases that the test of reasonableness in section 98(4) of the Employment Rights Act 1996 would require an employer to arrange for external panel review of selection scores. It is still less likely that such a safeguard would be required where it was not requested in collective consultation and the initial scores are already subject to moderation, challenge and further scrutiny on appeal.
- 6.9 Mr Habberley gave oral evidence that he spoke to Mr Moore about the ONR work in early 2016. The tribunal took into account (Reasons paragraph 111) that the claimant had provided e-mails from Mr Moore. The claimant's essential point, as I understand it from the

reconsideration application, is that Mr Bailey and Mr Hughes should have spoken to Mr Moore in June and July 2016 in the light of those e-mails. We considered that point when reaching our judgment. Our view was that the respondent's omission to take this step did not take the procedure outside the reasonable range.

- 6.10 Our conclusion at paragraph 115 was based chiefly on what Mr Bailey told us in his oral evidence about what material Mr Codling had on which to assess the claimant's technical skills. It was not put to any of the respondent's witnesses that Mr Codling should have been aware of any other types of work from having approved staff timesheets. Nor were witnesses asked about the specific entries in the claimant's CV to which the claimant now selectively refers in his reconsideration application. Reading the claimant's CV as a whole, there were many aspects to the claimant's skills and experience which, based on the limited knowledge of the tribunal, appeared consistent with a belief that they related to power generation and turbines.
- 6.11 The tribunal considered a large quantity of evidence about the workload that the respondent could have foreseen at the time of dismissal and appeal. The points made by the claimant in his application will not alter the tribunal's conclusion.

### **Conclusion**

7. Having looked at each of the claimant's grounds, I do not consider that there is any reasonable prospect of the original decision being varied or revoked. I therefore refuse the application for reconsideration so far as it relates to paragraphs 1 and 2 of the judgment.

Employment Judge Horne

12 September 2017

SENT TO THE PARTIES ON

18 September 2017

FOR THE TRIBUNAL OFFICE