Appeal No. UKEAT/0200/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 & 28 June 2016

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MRS C MADHAVAN APPELLANT

GREAT WESTERN HOSPITALS NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR EDWARD KEMP (of Counsel) Instructed by: Withy King LLP North Bailey House New Inn Hall Street Oxford OX1 2EA
For the Respondent	MS NADIA MOTRAGHI (of Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ

<u>SUMMARY</u>

VICTIMISATION DISCRIMINATION - Protected disclosure

RACE DISCRIMINATION - Continuing act

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant appealed the decision of the ET in respect of part of her claims of unlawful detriment on the ground of having made a protected disclosure and of race discrimination. The EAT (1) dismissed the appeal in relation to the whistleblowing claim, upholding the ET's decision that it was out of time; and (2) remitted the race discrimination claim to the ET for reconsideration of the issue of whether it is just and equitable to extend time.

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THE HONOURABLE MR JUSTICE SUPPERSTONE

1. For convenience I shall refer to the parties as "the Claimant" and "the Respondent" as they were before the Employment Tribunal ("the ET").

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2. This is an appeal by the Claimant against the Judgment of Employment Judge Mulvaney and members of the Bristol Employment Tribunal, sent to the parties on 29 March 2016, in respect of part of her claims of unlawful detriment on the ground of having made a protected disclosure and of race discrimination.

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3. The Respondent is an NHS Foundation Trust and provides acute hospital services at the Great Western Hospital and community health services across Wiltshire. The Claimant's employment with the Respondent commenced in 1993 and at the date of the hearing was continuing. She was appointed as a Consultant Ophthalmologist in 2008. Prior to her appointment as a Consultant Ophthalmologist, she was an Associate Specialist and "acted-up" as a Consultant from 2005. The Claimant had been Clinical Lead for Ophthalmology since August 2009.

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4. On this appeal, Mr Edward Kemp appears for the Claimant and Ms Nadia Motraghi appears for the Respondent, as they did before the ET.

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5. I shall consider first the Claimant's appeal against the ET's dismissal of her whistleblowing claim. That Claimant relied on six protected disclosures, only one of which was admitted by the Respondent, and 20 acts of detriment, two of which were withdrawn after cross-examination. The ET upheld two of the protected disclosure detriments complained of by

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the Claimant. The first was the delay to the Claimant's revalidation in May 2013. The second - which is the material one for the present purposes - is referred to as "detriment (g)". This was an implied threat contained in the last paragraph of a letter from Ms Fitzgerald, the Respondent's Human Resources Director, of 8 July 2014, which was found to be a detriment and was materially influenced by the Claimant's disclosure (referred to as disclosure (f)), that the practice of Mr Zaheer, a Consultant colleague, was putting patient care at risk.

6. At paragraph 8.74 of the Tribunal's Reasons, the finding of the Tribunal in relation to detriment (g) is recorded in the following terms:

> **"8.74. We found that the implied threat contained in the last paragraph of Ms Fitzgerald's letter of 8 July 2014 did amount to a detriment and was materially influenced by the Claimant's disclosure that Mr Zaheer's practice was putting patient care at risk. The implication in Ms Fitzgerald's letter was that in simply raising concerns (as well as in the tone of those concerns), the Claimant was being disrespectful of colleagues. By stating that this gave serious cause for concern, Ms Fitzgerald was implying that some action might be taken in response. This was a shot across the bow which the Claimant would have understood to be to discourage her from voicing concerns. We concluded that Ms Fitzgerald's criticism of the Claimant was materially influenced by the fact that the Claimant was raising concerns, and not just by the manner in which she did so."**

7. Mr Kemp submits that on the Tribunal's findings, therefore, Ms Fitzgerald had formed an unlawful motivation or animosity against the Claimant as at 8 July 2014. However, the claim was not presented until 28 May 2015. For the reasons explained by the Tribunal, which were accepted by the parties, any detriments that occurred prior to 11 December 2014 are out of time unless they form part of a series of acts, some of which were in time. The Tribunal went on to conclude that none of the acts occurring after 8 July 2014 amounted to public interest disclosure detriments. The claim was therefore out of time.

8. The Claimant contends that the Tribunal erred in not considering adequately or at all the causal relevance of disclosure (f) on detriments (h), failing to fully investigate the Claimant's

A concerns in July 2014, (j) the addition of term of reference 7 to Mr Zaheer's grievance investigation, and (q) the outcome of term of reference 7.

B 9. Mr Kemp summarises (at paragraph 2 of his skeleton argument) what he describes as a "significant legal issue of general public importance in whistleblowing detriment claims" raised by this appeal as being:

C > **"2. … the proper approach to causation in circumstances where one employee is found by an ET to have acted to the complainant's detriment on the ground of a protected disclosure and who then advises others (who do not have knowledge of the protected disclosure) who subsequently act to the complainant's detriment. …"**

10. He submits that there can in principle be causation in such circumstances and that to

D hold otherwise would fail to advance the purpose of the **Public Interest Disclosure Act 1998**.

11. In **<u>Western Union Payment Services UK Ltd v Anastasiou</u>** UKEAT/0135/13, HHJ

E Eady QC, delivering the judgment of this Tribunal, said at paragraph 74:

> **"74. Allowing that the relevant statutory framework places the burden of proving the reason for any detriments found on the employer (s.48(2) [Employment Rights Act 1996]), the question the ET had to grapple with was whether the protected disclosure had *materially influenced* the employer's treatment of the Claimant in this case (per Elias LJ in *Fecitt* [*v NHS Manchester* [2012] ICR 372]). We can see that - hypothetically - there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially**
F > **influenced her treatment of the complainant. In such cases, however, it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened."**

In his final written submissions to the Tribunal, at paragraph 17, Mr Kemp referred to this

G decision and appeared to suggest that this case is a "chain of command" type of case.

12. At paragraph 9.18 of its Reasons, the Tribunal referred to the **<u>Anastasiou</u>** case and said:

H > **"9.18. … We accepted the proposition that if those in management are instructing others in the chain of command to carry out actions to a whistleblower's detriment because of the disclosures, those actions would be caught by the section even if the perpetrators did not know of the disclosures. …"**

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13. The Tribunal went on to say:

> **"9.18. … This argument might apply in this case to the actions of … Mr Pickworth who, we found, did not know of the Claimant's disclosures. However we found no evidence that those individuals were acting on the direction of others who were motivated by the Claimant's disclosures. …"**

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14. Before this Tribunal, the evidence that Mr Kemp relies upon in support of his submission as to the causal relevance of disclosure (f) to detriments (h), (j) and (q) is that Ms Fitzgerald admitted to the grievance investigator, Caroline Wigley, that she had provided advice to add the additional term of reference to Mr Zaheer's grievance. This evidence is recorded in a document that was before the Tribunal. Further, it is recorded in the joint note of the evidence that under cross-examination she said that she had advised Mr Rooney, the Respondent's Medical Director, to add the term of reference referred to as term of reference 7 to the grievance.

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15. Mr Kemp criticises the Tribunal for making no reference to this advice from Ms Fitzgerald in its Decision. This is despite the fact that he himself made no reference to this advice either in his closing written submissions, which ran to some 37 pages, or in his closing oral submissions. Nevertheless, it is his submission that having made the findings it did in relation to Ms Fitzgerald at detriment (g), the Tribunal should of its own volition have considered whether her unlawful motivation had a material influence on the subsequent actions of others, namely Mr Rooney and Mr Pickworth, through the advice she gave to Mr Rooney with regard to the addition of the term of reference. Mr Kemp submits that the Tribunal erred in failing to do so.

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16. The material findings of fact made by the Tribunal in relation to detriments (h), (j) and (g), are as follows. The Tribunal considered detriment (h) at paragraphs 8.75 to 8.79 of the Decision. Critically at paragraph 8.77, the Tribunal state:

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> **"8.77. In the circumstances we concluded that the Respondent did not fully investigate the concerns raised by the Claimant and that this amounted to a detriment. We accept Ms Fitzgerald's evidence that she acted on the information given to her by Ms Grewal, and that that was the reason that the investigation was not pursued. However we found that this did not fully explain the decision not to pursue the investigation. We found that there was a disparity of treatment between the manner in which the complaints raised by the Claimant against Mr Zaheer and Mr Guy Smith were dealt with and those raised by them against the Claimant. Mr Zaheer's complaints did not all concern recent events but were nevertheless investigated formally. We found that Ms Fitzgerald viewed the Claimant as a difficult and challenging person. The Claimant was seen as a thorn in the side by management but we concluded that this was not because of her disclosures. We found that the negative view of the Claimant predated the April 2013 and subsequent disclosures and continued not because the Claimant was raising issues of patient safety but because the Respondent viewed her communication style as primarily responsible for the tensions within the department which led to a disproportionate amount of management time being invested in resolving issues that arose."**

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17. At paragraphs 8.84 to 8.93, the Tribunal considered detriment (j):

> **"8.84. Mr Rooney appointed Tony Pickworth, Consultant in Anaesthesia and Intensive Care Medicine, to investigate Mr Zaheer's grievance under the Respondent's Bullying and Harassment and Grievance Policies. Mr Pickworth was not aware of any of the Claimant's disclosures or of the Claimant's grievance alleging race discrimination (the protected act). He was aware of the whistleblowing letter sent in April 2013, but did not know whether the Claimant had signed it.**
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> **8.85. Mr Pickworth met with Mr Zaheer on the 5 September 2014 and following that meeting he and Mr Rooney formulated terms of reference for the grievance, which covered the concerns raised by Mr Zaheer. The Claimant was notified of Mr Zaheer's grievance on the 14 October 2014 and invited to an investigation meeting. It was Mr Pickworth's evidence, which we accepted, that in the course of his interviews with Nick Smith, Karen Fido and Sally Fox, each referred to the Claimant discussing with them a GMC warning on Mr Zaheer's file. Mr Pickworth was concerned that in doing so, the Claimant may have been seeking to discredit Mr Zaheer. Mr Zaheer was unaware that the Claimant was doing this and so had not raised the issue himself.**
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> **8.86. Mr Pickworth decided that the issue of the Claimant disclosing Mr Zaheer's GMC warning to colleagues should be investigated as it might have been done to undermine Mr Zaheer's credibility. He proposed to Mr Rooney on the 23 October 2014 … that it be added as an additional term of reference to be investigated within the grievance procedure. Mr Rooney agreed that this concern should be added as a term of reference and be investigated in the course of Mr Zaheer's grievance although it was decided that Mr Zaheer was not to be informed of it. Mr Rooney wrote on the 28 October 2014 … to inform the Claimant of the additional Term of Reference to be added to Mr Zaheer's grievance."**

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18. At paragraph 8.88, the Tribunal note their concern about the expansion of the terms of reference. They considered it was inappropriate for the grievance investigator or grievance manager to add to a grievance investigation, an issue of which the aggrieved party is, and is to

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remain, unaware. However, despite their concerns they accepted (at paragraph 8.92) Mr Pickworth's and Mr Rooney's evidence that they believed it was appropriate.

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19. At paragraphs 8.115 to 8.119, the Tribunal considered detriment (q). At paragraph 8.119, the Tribunal found:

> **"8.119. … that in the light of the numbers of people to whom the Claimant had given the misinformation, the conclusion reached by Mr Pickworth that the Claimant had undermined Mr Zaheer's position by spreading unfounded rumours about him in breach of the Bullying and Harassment policy, was justified. We found that having a complaint of bullying upheld against the Claimant did amount to a detriment but found no evidence that it was because of the Claimant's disclosures or because of her Protected Act. We found that the reason the complaint was upheld was because Mr Pickworth concluded that the Claimant had provided the misinformation widely and without good reason for doing so. Mr Rooney concurred with that view. Although the Claimant had raised the issue with him in April 2014 and he had looked into it, he had not known at that time that the Claimant had given the information to a number of others without checking it first. We also found Mr Pickworth's investigation and conclusions to have been fair. …"**

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20. In section 9 of its Decision, the Tribunal set out its conclusions and started at paragraph 9.1 by recording that it had considered all of the evidence that it had heard, the documents to which it was referred and also had regard to the submissions of the parties. From paragraph 9.9 onwards the Tribunal repeated its findings of fact in relation to each of the detriments relied on by the Claimant.

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21. At paragraphs 9.31 and 9.32, it set out its conclusions in relation to detriment (h), referring specifically at paragraph 9.31 to the Claimant's contention that the detriment was "as a consequence of disclosures" including (f). Specifically at paragraph 9.32 the Tribunal stated that it did not find that Ms Fitzgerald's inaction on this issue was materially influenced by the fact of the Claimant's disclosures.

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22. At paragraphs 9.36 and 9.37, the Tribunal's conclusions in relation to detriment (j), are set out. Again in the heading at paragraph 9.36, the Tribunal referred specifically to the

Claimant's contention that the allegations added as a consequence of disclosures which included (f).

23. At paragraphs 9.52 and 9.53 (again at paragraph 9.52 referring to disclosure (f)), the Tribunal set out its conclusions in relation to detriment (q). At paragraph 9.53, the Tribunal gave full reasons for its conclusion:

> **"9.53. We found that having a complaint of bullying upheld against the Claimant did amount to a detriment but found no evidence that it was because of the Claimant's disclosures or because of her Protected Act. We found that the reason the complaint was upheld was because Mr Pickworth concluded that the Claimant had provided the misinformation widely and without good reason for doing so. Mr Rooney concurred with that view. Although the Claimant had raised the issue with him in April 2014 and he had looked into it, he had not known at that time that the Claimant had given the information to a number of others without checking it first. We also found Mr Pickworth's investigation and conclusions to have been fair. He stated in his report summary that there was behaviour of other members of the Ophthalmology department, including Mr Zaheer that would also breach the Bullying and Harassment Policy and that the Claimant's behaviour should not be viewed in isolation. We were satisfied with the explanations given by Mr Pickworth and Mr Rooney for upholding this matter and found that the detriment was not materially influenced by the Claimant's disclosures or done on the grounds of her protected act (of which we found neither were in any event aware)."**

24. There is an issue between the parties as to whether the "separate acts" approach of the Court of Appeal in **CLFIS (UK) Ltd v Reynolds** [2015] ICR 1010, applies only to discrimination claims. It is not necessary for me to decide that point. For the purposes of this appeal I shall assume in the Claimant's favour: first, that the dicta of HHJ Eady QC in **Anastasiou**, on which this part of the appeal is based, is good law; secondly, that Mr Kemp is correct in his submissions as to the limits of the "separate acts" approach.

25. It should not be necessary to emphasise that the Decision of the Tribunal must be read as a whole. I am entirely satisfied that on the evidence, the Tribunal was entitled to make the findings that it did. It had been reminded of the **Anastasiou** principle on which the Claimant relies and expressly had regard when considering detriments (h) and (q) to detriment (g), and to the issue of causation.

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26. The fact that the Tribunal did not refer expressly to the advice of Ms Fitzgerald is in my view of no significance. It is clear from the Tribunal's findings that it took the view that the decision to expand the terms of reference of Mr Zaheer's grievance was as a result of the proposal by Mr Pickworth with which Mr Rooney agreed. There is no evidence that Ms Fitzgerald was involved in the upholding of Mr Zaheer's grievance on the additional term of reference (detriment (q)). Indeed the evidence is to the contrary. Ms Fitzgerald was asked about this matter under cross-examination and said that she did not advise on the outcome and it would have been inappropriate for her to do so. Mr Rooney in his evidence said that he was supported by Claire Warner in HR with regard to how the outcome should be communicated to the Claimant.

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27. Further, I reject Mr Kemp's submission that the reasons provided in respect of detriments (h), (j) and (q) were not adequate. The Tribunal made clear findings as to the reasons why the Respondent's employees acted as they did in respect of each allegation of detriment. Accordingly, for the reasons I have given, grounds 1 and 2 of the appeal fail.

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28. Turning to grounds 4 to 7 - the race discrimination appeal - in support of her claim that the Respondent treated her less favourably because of her race than a person of another race was or would have been, the Claimant relied on Dr Charlotte Cannon as a comparator and the treatment that the Claimant complained of was the manner in which her pay was calculated, specifically in respect of three matters. First, the acting up allowance paid to the Claimant between 2005 and 2008. Second, the terms offered to the Claimant on her appointment to the role of Consultant in 2008 in that she was provided with a non-pensionable payment rather than a pensionable pay increase. Third, the payment that the Claimant continues to receive.

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29. The Tribunal concluded that the acts that the Claimant alleged were discriminatory were decisions made in 2005 and 2008 as to the correct pay point that applied at the time of the Claimant's promotion to acting Consultant and then to Trust Consultant. These acts had continuing consequences, but there was no evidence that the Respondent operated a discriminatory policy whereby non-Caucasian personnel were placed on a lower pay point than their white counterparts.

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30. Consequently, time for bringing a complaint for race discrimination based on those decisions began to run from the dates they were made - **Sougrin v Haringey Health Authority** [1992] ICR 650 - and therefore the Claimant's claim was submitted considerably out of time.

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31. Mr Kemp, relying on the decision of the House of Lords in **Barclays Bank plc v Kapur** [1991] IRLR 136, and in particular on the speech of Lord Griffiths at paragraph 21, submits that the Tribunal erred as the Claimant's claim was that the Respondent had maintained, continued or kept in force, a pay disparity between her and her comparator affecting her pay terms and her pension which amounted to a continuing act. Her claim could therefore be distinguished from **Sougrin** and the case of a single act or acts with the continuing consequences. Further, there is no requirement that a discriminatory policy must be in operation in order to establish a continuing act; see **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96, per Mummery LJ at paragraph 52.

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32. I reject this submission. This was not a case where a policy is the discriminatory act, as in **Kapur**. **Hendricks** does not assist. That was a case where the individual relied on numerous different acts to evidence a state of affairs. The instant case is one of two decisions made in 2005 and 2008, in respect of which the Claimant has suffered consequences thereafter.

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There was in my view no error made by the Tribunal in the approach it adopted to whether there was a continuing act.

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33. However, that is not an end to the jurisdiction point. A Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider all relevant circumstances (see **Robertson v Bexley Community Centre trading as Leisure Link** [2003] IRLR 434). A Court will not interfere with the exercise of discretion

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unless the Tribunal erred in principle or was otherwise plainly wrong.

34. Further, I bear in mind that the burden of proof is on the Claimant to convince the

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Tribunal that it is just and reasonable to extend time and that in most cases there are strong reasons for a strict approach to time limits (**O'Brien v Department for Constitutional Affairs** [2008] EWCA Civ 1448). However, the Tribunal dealt with this issue in a single sentence at

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paragraph 9.77, where it stated that:

> **"9.77. … There was no evidence provided for why it might be just and equitable to consider extending time to enable this complaint to be heard and we therefore concluded that the Tribunal did not have jurisdiction to hear the complaint."**

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35. In attempting to support this finding, Ms Motraghi referred to the fact noted at paragraph 9.76 of the Decision that the personnel who made the decisions on the Claimant's pay in 2005 and 2008 were no longer employed by the Respondent and were not available to

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give evidence to the Tribunal hearing, which she submitted indicated an appreciation by the Tribunal that an extension of time would prejudice the Respondent. Further, the Tribunal's decision on the merits of the claim, namely that there was no evidence from which it could infer that the Claimant was less favourably treated in respect of her pay than a person from a

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different race would have been, was a matter to be taken into account when considering

whether it was just and equitable to extend time. She also referred to the legal representation that the Claimant had had and her knowledge of time limits.

36. However, I have formed the view that there has been a failure by the Tribunal to give adequate reasons for its refusal to extend time on just and equitable grounds. It was, rightly in my view, accepted by Ms Motraghi that the Tribunal had erred in having regard to irrelevant considerations when considering the issue of comparator. It follows that Dr Cannon was an appropriate comparator.

37. That leaves the issue of less favourable treatment. Mr Kemp criticises the Tribunal in that regard. His principal criticism is that the Tribunal referred to Ms Middleton's evidence on behalf of the Respondent at paragraphs 8.43 to 8.47, which it accepts without considering the evidence before the Tribunal on behalf of the Claimant and the competing submissions of counsel. The evidence from both sides on this issue was fairly detailed and complicated.

38. There is in my view merit in Mr Kemp's submission that the Tribunal has not given adequate reasons for accepting the evidence of the Respondent and rejecting the evidence of the Claimant. That failure supports Mr Kemp's submission that the Tribunal failed to give adequate reasons for refusing to extend time on the just and equitable ground, the merits of the claim being one of the factors to be considered when exercising its discretion in relation to that issue.

39. For all these reasons, I have concluded that the issue of whether it is just and reasonable to extend time should be remitted to the Tribunal for reconsideration.