EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J Jones	and	Tesco Stores Limited

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The Claimant's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

1. The Claimant has applied for a reconsideration of the Judgment dated 25 May 2017 which was sent to the parties on 1 June 2017. The grounds are set out in her e-mails of 14 and 16 June 2017 which were received before she confirmed that she wished to receive written Reasons for the Judgment.

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for reconsideration under rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

3. The grounds for reconsideration are only those set out within rule 70, namely that it is necessary in the interests of justice to do so. The earlier case law suggested that the 'interests of justice' ground should be construed restrictively. The Employment Appeal Tribunal, in *Trimble-v-Supertravel Ltd* [1982] ICR 440, decided that, if a matter had been ventilated and argued at the hearing, any error of law fell to be corrected

on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review did not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*". More recent case law has suggested that the test should not be construed as restrictively as it was prior to the introduction of the overriding objective (which is now set out in rule 2) in order to ensure that cases are dealt with fairly and justly. As confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it is no longer the case that the 'interests of justice' ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, the EAT stated that the requirement to deal with cases justly included the need for there to be finality in litigation, which was in the interest of both parties.

4. The Claimant's application relies upon 3 grounds; the existence of new evidence, alleged inaccuracies in the Judgment and questions over the credibility of witnesses, although the body of the application does not contain points or arguments which obviously relate to one or more of those points. It is somewhat unstructured. The arguments have been considered as they have been set out and the main threads seem to be as follows;

    (i) That the layby where the Claimant had parked was a recognised parking area for LGVs, as illustrated in further photographs, and was not properly designated as a bus stop;

    This was not a *Burchell* conduct unfair dismissal claim. The Claimant had resigned because she felt that the allegations of direct discrimination had amounted to a fundamental breach of the implied term of mutual trust and confidence. The allegations which had concerned of 17/18 January did not specifically relate to the alleged misidentification of the layby as a bus stop. That had always been a small point. The crucial issue for the Respondent had been the fact that she left the vehicle on a public road overnight and had not contacted Avonmouth;

    (ii) Mr MacKenzie's evidence concerning the identification of her vehicle from the M4;

Even if there may now be some doubt as to Mr MacKenzie's ability to have identified the Claimant's vehicle as he had travelled along the M4, the Claimant did not dispute that it was there. This was a small point and, even if Mr MacKenzie's evidence could have been called into doubt in that respect, it was not clear to what extent and/or how the Claimant sought to challenge other parts of it now;

(iii) That the Claimant had no time to reach Magor DC;

This point was argued before the Tribunal and there is no reason to re-open the matter now on the basis of what the Claimant has set out in her application. Again, the point has to be stressed that the Respondent's main concern had been her failure to contact Avonmouth, not her failure to have taken other opportunities, including the chance to have reached the Magor DC, earlier. Of those opportunities, her ability to park at Magor Services or an earlier service station on the M4, appeared to have been more relevant to the Respondent than the possibility of her having reached the Magor DC;

(iv) The conduct of other drivers and the Respondent's alleged inconsistency;

The Claimant has now suggested that other male drivers may have parked their vehicles overnight and escaped discipline. In addition to the situations of Mr Moore and Mr Howells which we considered during the hearing, the Claimant has now referred to a Mr Garwood. It was important to remember that Mr Legg had investigated an issue concerning an alleged similar case during his investigation [131]; he had asked other managers about it, who had heard nothing about it. Mr McKenzie clearly stated that he had not been aware of any other incident similar to the Claimant's.

5. In essence, the Claimant's arguments appear to be an attempt to rerun the original disciplinary hearing at which she received her final written warning. Given that the Tribunal was not dealing with an ordinary unfair dismissal complaint, she really needed to demonstrate that there had been no reasonable or proper cause for the action which was taken against her. The evidential issues that she has raises now do not undermine the thrust of the rationale for the Respondent's decision. With the exception of the possible further arguments of inconsistency, there is nothing in any of the points which have been raised which suggest that the four particular complaints of direct discrimination set out within paragraph 26 of the Case Management Summary of 12 December 2016 had any more merit than they did before the Tribunal. Importantly, since the

alleged fundamental breach was based upon those same arguments, the constructive unfair dismissal complaint falls into the same category.

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Employment Judge Livesey
Dated 27 June 2017