EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Kenbata	**v**	**London Borough of Brent**

Heard at: Watford **On**: 14 November 2018
Before: Employment Judge R Lewis

Appearances
For the Claimant: Ms N Mallick, Counsel
For the Respondent: No attendance or representation

RECONSIDERATION JUDGMENT

1. The judgement of 15 January 2018 is varied. The claimant is ordered to pay to the respondent costs of £4,000.

REASONS

1. This was the hearing of the claimant's application under Rule 70 for reconsideration of the Costs Judgement of January 2018.

2. At the start of the listed hearing there was no attendance or representation from the respondent. Rule 47 of the tribunal rules provides:

> "If a party fails to attend or be represented at the hearing the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it should consider any information which was available to it, after any enquiries that may be practicable about the reason for the party's absence."

3. With that framework in mind the tribunal undertook the following enquiries as to the respondent's absence:

   3.1 The Notice of Hearing of 28 July had been correctly addressed to the respondent at the DX address which it had provided.

   3.2 During an adjournment the judge checked online that that is still the current DX address and it is.

   3.3 The tribunal file showed that the last correspondence from the respondent was an email dated 17 May 2018 and at the judge's request a tribunal clerk checked that there was no recent item from the respondent in the general email inbox for the tribunal.

3.4 At the judge's request Ms Mallick telephoned the chambers of Mr Andrew Smith, who has represented the respondent throughout this litigation and was told that Mr Smith has not been briefed for today's hearing but had been briefed for a preliminary hearing in the claimant's further cases the following week.

3.5 At the judge's request a tribunal clerk telephoned the respondent. She reported that this was a frustrating experience but could make no contact with any person who appeared to have knowledge of or responsibility for this case.

3.6 The clerk reported that she had asked for Mr Field and Ms Rhoden, whose names are on the tribunal file, and was told that they are no longer employed by the respondent. Ms Mallick had obtained from Matrix Chambers the name of Mr Keith McMahon as a representative of the respondent. The clerk reported that the respondent's switchboard was unable to locate a person of that name within its systems.

3.7 The Notice of Hearing had not been returned to the tribunal and therefore had been properly served in accordance with Rule 90. The hearing began at 11:05.

3.8 The tribunal, before considering the application, asked Ms Mallick whether she wished to proceed in the knowledge that the respondent may wish to contend that it had not been notified or had made an administrative error. She asked to proceed.

3.9 The tribunal considered whether we should adjourn of our own motion but were of the view that given the delays and length of this matter we should proceed. We did so on the understanding that it left the costs applications in this case in a position which was inherently unsatisfactory namely, that in December 2017 we had heard the application in the absence of the claimant and in November 2018 we heard the reconsideration application in the absence of the respondent.

4. This was an application under rule 70. Although rule 70 does not set out the grounds on which a tribunal may reconsider it is drafted on the basis that the grounds for what was then called Review, and existed in rule 34(3) of the 2004 rules, underpin the present framework. Rule 34(3) of the 2004 rules provided that review may be allowed "where the interests of justice require such a review." The powers of the tribunal under Rule 70 are that a decision may be "confirmed, varied or revoked".

5. A significant part of Ms Mallick's submission was based on a letter from Dr Hudson about the claimant addressed 'To whom it may concern'. It was dated 7 December 2017. It described Dr Hudson as "CT3 in Psychiatry". It reads in full:

> "Mr Kenbata has requested this letter to confirm that he is currently undertaking a course of cognitive analytic therapy for problems affecting his mood, energy and relations with others. His current situation with regard to employment and his ongoing court proceedings have been identified as triggering processes to some of the psychological problems he is working through. Please give careful

> consideration to his request to avoid setting his court dates on three consecutive days, and whether attending to the cases on three consecutive days might affect his ability to take part meaningfully in the proceedings."

6. The bundle produced for today by the claimant showed that that letter was sent by email to the respondent on 7 December at 15:44. The email named five individual recipients at Brent and it was acknowledged the following morning by Ms Sarah Bush, Senior HR Adviser. It was sent in support of the claimant's request to adjourn his disciplinary appeal hearing, which was due to be heard on 13 December, the day after the costs application in this tribunal on 12 December.

7. When the claimant applied to this tribunal at about the same time for adjournment of the hearing on 12 December, he made no reference to medical reasons and he did not send in the medical letter. He referred to other matters set out in our first costs judgment.

8. Ms Mallick made the point that even though the claimant had himself not sent Dr Hudson's letter to the tribunal and not relied on it, it was incumbent on the respondent to produce the letter to the tribunal as a matter of candour in accordance with the overriding objective. We agree as a matter of principle. The respondent is a major public authority and was duty bound to place before the tribunal such information as it had as might be relevant to the decision to adjourn. In so saying, we do not of course know if the email was in the possession of Counsel on 12 December (we assume not, as we are confident that Mr Smith would not have kept it from the tribunal), but that does not matter. The important point is that it was in the hands of the respondent.

9. We take Dr Hudson's letter at face value and ask ourselves what the tribunal might have decided to do if we had been given that letter as part of the discussion at the start of the hearing on 12 December about whether to adjourn. It is perfectly possible that the tribunal might have taken a robust view, and said that as all that the letter does is advise that the claimant should not be asked to do three consecutive days of work related meetings, and that our hearing was the first of only two scheduled days, we could safely proceed even in the face of Dr Hudson's advice.

10. Equally, we might have taken a cautious view. We might have said that at the hearing on 12 December we were being asked to award a significant amount of money against a claimant who was then unemployed, having been dismissed by the respondent, was living at some distance from London, who did not have a permanent legal representative and where the letter specifically referred to mental health issues which were related to his employment and to his relations with others.

11. It seems to us that there is a reasonable prospect that we might have adjourned and that if we had done so that there would have been a hearing at which both sides were represented. We cannot and for these purposes do not consider that that is a prospect or a lost opportunity for which we need to set a mathematical percentage. We think it is enough that we say that there was a reasonable prospect.

12. Ms Mallick then went on to the points which she would have made if there had been an adjourned hearing and therefore she had had the opportunity to address us in full. She referred to one or two subsequent documents but was careful not to make the mistake of asking us to apply hindsight to our approach. However, we noted a short medical report of 9 February 2018, addressed, To whom it may concern, stating that it was from the claimant's GP practice and stating that the claimant "suffered from anxiety and depression for the last few years. He was previously seen by a psychiatrist for assessment and he has also done some counselling as well as 16 sessions of cognitive analytical therapy."

13. Miss Mallick went on to refer in submission to aspects of our original reserved judgment, not with a view to challenging our findings of fact of May and June 2017, but to submit that her points may have had an impact on the exercise of discretion in making a costs award. In other words, she did not ask us to revisit our findings of fact with a view to challenging our finding of unreasonable conduct of litigation but rather to take matters into account as part of the general balancing exercise in exercising our discretion first, as to interests of justice and secondly, to the amount of award.

14. In particular, she submitted that the tribunal had not made any finding that the claimant had been deliberately untruthful to it. We agree that that is the effect of our judgement. The tribunal's original judgment stressed that the great majority of our findings related to disputes of interpretation of workplace events. On that basis and at greater length Ms Mallick submitted that the reality of the matter was that the claimant's disputes and claims had been founded on his perceptions of events at work, or of the behaviour of colleagues, and that the burden of the medical information was that the claimant now saw that his perception may have been clouded. She asked us to attach weight to that as a matter of discretion in considering the interests of justice.

15. Taking the point as an overview, we think it is well founded. That is not to say that we accept that the test of reasonable conduct is subjective; it must be objective. It is also a matter to be weighed in the balance of other factors which we did find namely, the effect of the events on the claimant's former colleagues and in the workplace generally.

16. Ms Mallick submitted that the tribunal may have misunderstood the issue of the claimant's access to legal advice in assessing reasonableness. She stressed that as he had chosen to instruct counsel on direct access, he was personally responsible for case preparation and did not have access to any professional overview and advice before the advocacy process. We accept that that point, which we have seen many times in direct access cases, was well made.

17. When it came to the amount of award, Ms Mallick relied on the same matters. She told us that the claimant had been dismissed in September 2017. In fact, we were told this at the costs hearing when we were told that his appeal against dismissal was due to be heard the following day. Our recollection is that we were also told that there had been some attempt at redeployment which had failed and that the stated reason for dismissal was the failure of redeployment namely, some other substantial reason. Ms Mallick referred to problems which the claimant had encountered in

obtaining a reference in taking up fresh employment. We were pleased to be told that the claimant has since returned to his professional walk of life. We were given no further information about the claimant's means and ability to pay.

18. Our task in considering the application for reconsideration is partly to unravel a number of variables which might have followed. In this case it would have involved the adjournment and the bilateral costs application.

19. It seems to us drawing the points together in the interests of justice, to proceed as follows. In our December costs judgment, we found that the litigation had been conducted unreasonably. We confirm that finding on the footing and for the reasons set out in our judgment.

20. Secondly, we found that it was in the interests of justice to make a costs award and we confirm that finding and the reasoning. We repeat that whatever weight we attach, or would attach, to the claimant's mental illness, the test of unreasonableness is an objective one.

21. At the third stage, it seems to us that in the circumstances of which we heard today, the appropriate sum for the costs award is £4,000.00 which seems to us a sum to balance the gravity of the unreasonableness which we have found with the information we have been given by and about the claimant today, and the interests of the respondent which we identified in our earlier judgment.

22. Postscript: On 19 November Mr McMahon wrote to the tribunal to say that the respondent had been told of this hearing by Ms Mallick; that it had not received notice of the hearing; and to ask for written reasons. The tribunal has separately received notification that the claimant's other claims against the respondent have been compromised.

_____
Employment Judge R Lewis

Date: ……14 December 2018……..

Sent to the parties on: .....

.....
For the Tribunal Office