EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Mr P Fangli	v	Alexander Dennis Limited

DECISION ON AN APPLICATION FOR RECONSIDERATION OF A JUDGMENT UNDER RULE 71 OF THE EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2013

1. The claimant has applied for a reconsideration of the judgment of the Employment Tribunal sitting at Reading which was sent to the parties on 15 November 2019 under r.71 of the Employment Tribunal Rules of Procedure 2013. The procedure for an application for a reconsideration is set out in rule 72 of the Rules of Procedure 2013. It is a two-stage process. If the employment judge who chaired the tribunal panel which made the judgement considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused under rule 72(1). Otherwise the original decision shall be reconsidered by the full tribunal who made the original decision.

2. Having considered the application under r.72(1), I consider that there is no reasonable prospect of the judgment being varied or revoked on those grounds. The application for a reconsideration is rejected and the reasons are set out in the following paragraphs. In a number of places in this decision I refer to the issues as set out in the agreed list of issues (issues 1 to 10, including various sub-issues).

3. In relation to issue 2.a. of the list of issues and the Claimant's comments on paragraphs 25-35 of the Reserved Judgment, Mr Fangli argues that the Employment Tribunal has not taken account first, of his evidence that Mr Wilmot asked him to improvise and, secondly, Mr Beal's inability to show the temporary connection was not good. He continues that, had the Employment Tribunal taken account of these matters it should have

concluded that FW and SB intended to set him up. This is an example of the Claimant seeking to re-argue points in reconsideration which he argued at the final hearing and which the Tribunal took into account in reaching our judgment. It may be that there is no specific reference to the Claimant's evidence that he was asked to improvise in the judgment, but it is clear from paragraphs 25-35 as a whole that the Tribunal was aware of the Claimant's criticism of FW's evidence in this respect and made careful findings to the effect that for a number of reasons, there was objective evidence that the workmanship was worthy of criticism.

4. In relation to the criticisms of paragraphs 36-39 of the Reserved Judgment, we found that the complaint of FW was about the content of the job card and not about where it was left. Again, the Claimant seeks to reargue points which he argued previously, and which were rejected. Therefore, the points he raises have no reasonable prospect of causing our findings about reason for the imposition of the PIP being varied or revoked. As we note in paragraph 39 of the Reserved Judgment, it was not merely the job card which was the subject of reasonable criticism.

5. The Claimant repeats his allegation that FW and SB made inconsistent statements about whether the bus left the site. We took on board this observation at the time of making our Reserved Judgment, but it was insufficient to cause us to conclude that FW and SB were unreliable witnesses as a whole.

6. In relation to the Claimant's criticisms of paragraphs 46-48 and 48-49 of the Reserved Judgment, we do not criticise the Claimant in any way for having reached the conclusion that he has about the meaning of Article 7.3. However, we were of the firm view that he misunderstood it for the reasons we outlined. The Claimant complains that he was not invited to call witnesses to the hearing in front of Mr Richardson. It is clear from paragraph 49 of the Reserved Judgment that we understood the Claimant's case on this point and his submissions repeat points that he made at the hearing.

7. In relation to his criticism of paragraphs 50-51 of the Reserved Judgment, it is clear from paragraph 51 that we engaged with the Claimant's case on this point and concluded that Ms Leigh did not deliberately include inaccuracies in the notes for the reasons set out there. The Claimant's submissions in his reconsideration application do not add anything to the case that he has advanced already on this point.

8. In relation to the Claimant's criticism of paragraphs 52-55 of the Reserved Judgment, this concerns issue 2.e. where he alleged that on 7 October 2016, he received less favourable treatment by being held back from high voltage training and compared himself with the treatment given to two colleagues. By that date, there had only been one session of high voltage

training that had been undertaken by his colleagues and the reason why the Claimant had not undertaken it was that he had been away on holiday at the time (see our paragraph 53). In his reconsideration application, he says (see page 6 of the application) that "at the end, two of my workmates received the HV training (a three day training) and during that period I was at work" but the Claimant's allegation stemmed from his discovery on 7 October 2016 that there had not been any HV training in September. We accepted the details in the form at RB page 76 to be accurate. This was the basis for the Tribunal's finding that there had not been less favourable treatment in relation to HV training and nothing in the Claimant's reconsideration application causes me to think that there is a reasonable prospect that that finding would be varied or revoked.

9. In relation to the Claimant's criticisms of the Reserved Judgment paragraphs 57-59, he appears to argue that the discrimination reported to SL was not investigated properly. The only allegation of discrimination reported to SL was in relation to HV training (see paragraph 52.6 of the Reserved Judgment) and that was not a complaint that the Claimant referred to during the grievance hearing (see paragraph 59 of the Reserved Judgment). The criticisms that are set out in the paragraph on page 7 of the reconsideration application starting "The discrimination reported to SL…" that no enquiries were made about records of training for which the Claimant had been scheduled was not the allegation that he made which was that he had not been put on training when two comparators had. The allegation that he made was that the grievance investigation was an act of direct race discrimination. Had Mr Fangli shown that the investigation of the grievance was inadequate that would not, without more, have been sufficient to found an inference that he was treated less favourably or that the reason why the grievance was rejected was that of race. It can be seen that the Tribunal accepted that there was some criticism of the grievance process but was of the view that that was insufficient to cause us to infer that the reason for the shortcomings was that of race. There is nothing in the submissions made on reconsideration that have a reasonable prospect of causing that judgment to be varied or revoked.

10. In relation to the criticisms of Reserved Judgment paragraphs 61-62, our conclusion (see Reserved Judgment paragraph 151) was that the second PIP was imposed because it was a recommendation of the grievance and the original concerns remained unaddressed. This was not originally raised as an allegation against SL (see list of issues, paragraph 4B) and there is nothing in the Claimant's reconsideration application that means there is a reasonable prospect of the conclusion at paragraph 151 and 159 of the Reserved Judgment being varied or revoked.

11. The Claimant makes comments on our findings of fact in paragraph 63 of the Reserved Judgment but what he says in his reconsideration application

repeats observations he made at the final hearing and are not likely to cause us to vary or revoke our conclusions.

12. The Claimant appears to criticise our conclusion in paragraph 65 of the Reserved Judgment that we prefer the evidence of FW in relation to a particular meeting and draws attention to a discrepancy between FW's statement about holding a return to work meeting and the signature on the form. The Claimant argues that this would be a reason to doubt FW's credibility generally. He also asserts that he himself gave detailed consistent evidence at the hearing but could not find reference to it in the Reserved Judgment. As we say in paragraph 21 of the Judgment, we do not record all of the evidence which we heard in the Reserved Judgment and we explain how we have made judgments where necessary between conflicting accounts. It is true that the Claimant's oral evidence included many occasions in which he was clearly able to say he agreed with or confirmed the point that was being put to him or conversely disagreed with or could not confirm that point. Equally, there were occasions where he struggled to remember details. An example was that he was unclear about whether the meeting minutes that he had put forward as accurate were records of words spoken at the time and which were supplemental matters which he added after the event. The Claimant clearly takes issue with the conclusion we have reached but has not raise anything new or different from which it could be inferred that that conclusion has a reasonable prospect of being varied or revoked.

13. In relation to paragraph 67 of the Reserved Judgment the Claimant refers to cross-examination of FW about CB pages 48 and 49. He seems to be taking issue with our conclusion that FW had more exacting standards than the Claimant was used to. Contrary to the Claimant's recollection, the judge's notes of Mr Wilmot's evidence about CB page 49 is that he accepted that it was a picture of a job card which had not been completed before the Claimant went on holiday. Mr Wilmot's evidence was that he disagreed with the suggestion that the job card was incomplete when the Claimant returned from holiday pointing to some very small lines, six in number, on the photograph which he said were instructions. The Tribunal therefore had positive evidence from Mr Wilmot that whoever had had conduct of filling in the job card during the Claimant's holiday had done so as he was supposed to. As previously stated, the Tribunal had in mind all of the evidence presented to it, whether or not that was specifically referred to in the Reserved Judgment. There is therefore nothing in the Claimant's submissions in his reconsideration application that would cause the Tribunal to be likely to vary or revoke their findings of fact in paragraph 67.

14. In relation to the Claimant's observations on paragraphs 70-71 of the Reserved Judgment, these are submissions which either were or could have been made at the hearing. The paragraphs in question were part of our evaluation of whether there were objective grounds for implementing

the second PIP, remembering that the issue that we had to decide was whether that was an act of victimisation. We therefore focused in the Reserved Judgment on the criticism that was made in the PIP of not attaching relevant photographs to the job card. The Claimant questions in his reconsideration submissions why Mr Wilmot had refused pictures from his phone. Mr Wilmot's evidence to the Tribunal was that the Claimant had never shown his photographs on his phone. Additionally, his evidence was that they were not supposed to be on his phone; they were supposed to be on the job card. Although the Tribunal has not made a specific finding about whether the Claimant did or did not show photographs on his phone to Mr Wilmot, it does not seem to me that there is a reasonable prospect that revisiting this narrow factual matter would be likely to cause our judgment on the victimisation issue to be varied or revoked. It is one small point of detail that fed into a number of other pieces of evidence that led to our conclusion that the reason for the imposition of the second PIP was that it was part of the outcome of the grievance and there were continuing concerns about performance.

15. The Claimant makes observations about paragraph 89 of the Reserved Judgment and effectively argues that the Tribunal was wrong not to regard KW and AnSm as suitable comparators. He regards himself as being in a comparable situation with them because he was grinding outside and they were releasing brake dust outside. However, as we set out in paragraph 89, the Claimant was not holding the work piece in a vice and was not wearing suitable PPE. The Tribunal concluded that these were material differences between the case of the Claimant and that of the two putative comparators because they were important in the mind of the Respondent when deciding that it was necessary to investigate the Claimant for health and safety breaches. In his reconsideration application, the Claimant merely states that it is not the question if he was wrong to fail to use PPE. There is nothing in what he says that means that there is a reasonable prospect that our judgment that KW and AnSm were not suitable comparators is likely to be varied or revoked.

16. In the Claimant's comments on Reserved Judgment paragraphs 91-95, the Claimant addresses the question about what Mr Wilmot knew about his report to KH, the Health and Safety Manager. This is relevant to issue 5 and 6 where he alleges that he suffered detriments because of these reports to KH. In relation to the allegations of detriment on grounds of health and safety, it was for the Claimant to prove that the individuals alleged to have subjected him to detrimental treatment did so on the grounds that he had made his health and safety complaint. It is in that context that we made our findings about the knowledge on the part of Mr Wilmot of the reason for KH's visit. In the Claimant's reconsideration application, he says:

"H&S Officer comes in the workshop and addresses the matters about what I too[sic] pictures on my private phone. That I took pictures, and about what I took pictures, was reported to FW.

It doesn't take too much to get 1 + 1 together. Even if my report, to the H&S Officer, was not reported to FW. A probability of 100% is there that FW know why the H&S paid a visit."

17. He argues, in effect, that if it is possible to assume that workers are complying with FW's instructions not to document their work on the phone, then it can be assumed that it was reported to FW that the Claimant had taken pictures on his phone and FW would infer those were about matters that he regarded as being health and safety violations and that the Claimant had reported them to KH. There are several deductive leaps which the Claimant is inviting the Tribunal to make which are not supported by any evidence. Bearing in mind that the burden was on him, the Tribunal preferred the report by KH to Mr Cottrell that we detail in paragraph 94 of the Reserved Judgment and there is nothing in the reconsideration application that has a reasonable prospect of causing that conclusion to be varied or revoked.

18. The Claimant asserts that his statement to the full merits hearing regarding handbrake noise was not taken into consideration and appears to question Mr Gokal's judgement that the handbrake had not yet been applied. We did not need to make a judgment about whether Mr Gokal's judgement on this was reasonable or not. Our finding was that Mr Gokal had accepted the Claimant's evidence that the bus had come to a halt before he started walking down the side of it. See also our conclusion at paragraphs 156 and 165. The allegation in relation to dismissal was that it was an act of direct race discrimination, victimisation, or health and safety detriment. There was no claim of so-called ordinary unfair dismissal because the Claimant did not have two years' service. The Tribunal did not therefore have to consider whether dismissal on the basis of the findings of fact of Mr Gokal was within the range of reasonable responses.

19. In relation to the Claimant's criticisms of Reserved Judgment paragraph 102, we were of the view that Mr Gokal was "not as attuned to allegations of discrimination as, perhaps, he should have been". I take into account what the Claimant says in his reconsideration application but the question that we had to decide was whether or not the reason why Mr Gokal decided to dismiss was that of race or victimisation. We also had to consider whether it was because the Claimant had raised health and safety complaints which we found Mr Gokal did not know about. The Tribunal was able to make positive findings about Mr Gokal's reasons for deciding to dismiss and there is nothing in the Claimant's reconsideration application that means that it is likely that that judgment would be varied or revoked. Furthermore, it is implicit in that that the Tribunal looked to the Respondent

to give an explanation for their actions in reaching the conclusion that we did.

20. What the Claimant says about paragraph 104 of the Reserved Judgment does not seem to be advanced as an argument why the Judgment should be varied. It seems to be clarification that he regarded himself rather as having been dismissed as an act of victimisation than dismissed as an act of race discrimination. Both claims were considered on their merits by the Tribunal.

21. In his criticisms of the paragraph 105 of the Reserved Judgment, the Claimant argues that none of the witnesses intervened to stop discrimination against him and that none of them took his word seriously. However, the complaints of discrimination that the Claimant has actually raised are against the managers. He did not give sufficient information to the Respondent to enable them to investigate the alleged comment that colleagues would "not share secrets with Hungary". This alleged comment was not relied on by the Claimant before us as evidence from which a discriminatory mindset could be attributed to the alleged perpetrators; something we took care to verify with him. Nonetheless, the Tribunal thought it important to consider whether there had been a culpable failure to investigate this allegation. Our conclusion was that there had not been and that nothing could be inferred from the Respondent's conduct in relation to that. The comments made in the Claimant's reconsideration application do not mean that there is a reasonable prospect that that conclusion would be varied.

22. Paragraphs 110-112 of the Reserved Judgment are paragraphs which set out the Law. The comments made by the Claimant in relation to those paragraphs on page 13 of his application largely repeat what he says elsewhere in it. In addition, he says that "It is impossible in a bus factory/workshop to avoid the situation ……. Workers standing next to moving vehicles". If it is the case that the Claimant seeks to argue that there was a comparable case where a particular named individual was standing next to a moving vehicle in the way that he walked down the side of a bus that was Mr Gokal found had just been parked and that individual was not disciplined and this is not evidence that was put before the Tribunal at the hearing. However, the Claimant appears in fact to be relying on a hypothetical situation and there was no evidence from which we could have concluded that such a worker would have been treated more favourably than the Claimant.

23. The Claimant alleges at page 14 of his reconsideration application that the Tribunal rejected his evidence that he had developed a mental illness during his time at the Respondent. Although the Claimant did not produce any medical evidence, the Tribunal took his explanation that he has been diagnosed with obsessive compulsive disorder at face value. He did give

evidence that he had had some sickness absence during his employment because of the stress of the situation he was working under and he refers in his reconsideration application to CB pages 239-242, namely his medical records. I have every sympathy for the Claimant, as I would for anyone who was suffering from mental illness. However, the fact that he has a diagnosable mental illness is not proof that the Respondent behaved in a way that he alleges. His assertion that it is so improbable as to be a probability of 0% that someone should develop a mental illness without being exposed to discrimination, bullying and harassment and victimisation is not one that has any probative weight and is not likely to cause our judgment to be varied and revoked.

24. He also argues that the Tribunal failed to take into account the fact that "a worker exposed to stress harassment is more likely to have a lower performance than other workmates" and that he should be considered as a vulnerable because of self-diagnosed Asperger's Syndrome. He did not say at the full merits hearing that he believed that he is a person with Asperger's Syndrome. Had this been a so-called "ordinary" unfair dismissal for reasons related to conduct or capability then the potential effect of his health upon his performance may have been relevant considerations for the employers, although he does not appear to have relied upon this defence at the time. The Tribunal was concerned with claims of race discrimination, victimisation and automatically unfair dismissal on health and safety grounds. Whether the employer should or should not have made allowances for alleged ill health is not the question that the Tribunal was tasked with answering.

25. May I apologise to the Claimant for the delay in making and sending this decision. This was in part due to the workload of the tribunal and in part due to the difficulty of scheduling a day when I could attend at the Tribunal in order to consider the reconsideration application alongside the notes of the original hearing and other paperwork.

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Employment Judge George

Date: …10 April 2019 ……..

Judgment and Reasons

23 April 2019

Sent to the parties on: .....

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For the Tribunal Office