EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Christopher Warwick	AND	Patterson Law Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 22 May 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In Person**
For the Respondent: **Miss S Hornblower of Counsel**

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the claimant's application for reconsideration of the Order for Costs is refused.

REASONS

1. The claimant has applied for a reconsideration of the Order for costs against him with reserved reasons dated 9 November 2019 which was sent to the parties on 26 November 2019 ("the Order for Costs").
2. The claimant first submitted a notice of appeal to this tribunal on 3 December 2018 (rather than an application for reconsideration) but

subsequently confirmed that he was making an application for reconsideration by email dated 4 December 2018. The claimant was directed to provide detailed reasons for that application and to copy it to the respondent. The claimant then submitted a detailed application for reconsideration by email dated 11 December 2018. By email dated 13 December 2018 the respondent gave reasons why it opposed the application for reconsideration. By email dated 13 December 2018 the claimant submitted a reply to the respondent's response to the application. Although the respondent had consented to this matter being determined without a hearing, the claimant requested that the application should be heard in person, and this is the judgment which follows the hearing of his application.

3. 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. Although the claimant's detailed reasons for his application for reconsideration were presented to this tribunal and copied to the respondent on 11 December 2018, which was the day after the 14 day time limit had expired, nonetheless the claimant had submitted a form of appeal and confirmed that he sought reconsideration by email dated 4 December 2018. The application in principle was therefore received within the relevant time limit, and it is in the interests of justice to allow the application to proceed.
4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
5. The grounds relied upon by the claimant are therefore those set out in his email by way of application dated 11 December 2018, and his reply to the respondent's response dated 13 December 2018, which the claimant reconfirmed by way of his application in person today.
6. There are four aspects to the claimant's application for reconsideration, as follows: (i) The first is that the claimant's late application for postponement of the hearing to determine the respondent's costs application was refused, and the application went ahead in his absence; (ii) the second is against the first costs order in respect of the proceedings generally (which had led to the Preliminary Hearing on 12 March 2018 and the Reserved Judgment following that hearing dated 16 March 2018 which was sent to the parties on 20 March 2018 ("the Judgment")); (iii) the second costs order (in respect of the claimant's remaining breach of contract claim, which he subsequently withdrew); and (iv) in any event, the amount of the Order for Costs, given the claimant's means. I deal with each of these in turn.
7. With regard to the first matter, and the refusal to allow the claimant's late application to postpone the respondent's application for costs which was heard on 9 November 2018, this is dealt with in numbered paragraphs 2 to 5 inclusive of the Order for Costs. The claimant now pursues a slightly

different argument with regard to his unavailability for that hearing at short notice, namely that his car had not broken down during the long trip from the North of England to this Tribunal on the morning of the hearing, but rather that his engine warning lights had indicated problems, and that he was able to turn around and drive home. The claimant's original explanation was unconvincing, and this is now a different version. Be that as it may, as noted in paragraph 4(iv) and (vi) of the Order for Costs it had previously been agreed that the hearing would proceed by way of written representations, and the claimant had supplied written representations setting out his objections to both of the respondent costs applications, and had agreed the relevant bundle of documents in support. The claimant has therefore had the opportunity to prepare fully to respond to both applications, and his objections were considered carefully. I decided it was not in the interests of justice to allow his application to postpone the hearing for the reasons set out in the Order for Costs. Similarly, I do not consider that it is in the interests of justice now to revoke the Order for Costs and to re-hear the respondent's applications, because the claimant has already had the opportunity to oppose those applications, and there is no new information which has come to light and which was not reasonably available to the claimant at the time of those applications. There is no reasonable prospect of the earlier decision being varied or revoked.

8. With regard to the second matter, namely the respondent's first application for costs, the claimant seeks reconsideration on the basis that he objects to the conclusion that he had acted unreasonably in bringing and pursuing his disability discrimination claims, and his application to amend to include a sex discrimination claim, to the conclusion of the Preliminary Hearing. However, my conclusions in that respect were based on my findings which were set out in the Judgment, which included findings relating to the claimant's dishonesty. The claimant did not seek reconsideration of that Judgment, nor did he seek to submit an appeal against it. The respondent was entitled to rely upon the findings as set out in the Judgment in its successful application to the effect that the costs threshold was triggered, for the reasons explained in paragraphs 43 and 44 of the Order for Costs. For these reasons I do not consider that it is in the interests of justice to revoke or vary the Order for Costs in this respect.
9. With regard to the third matter, namely the respondent's second application for costs, the claimant effectively repeats his reasons for his late withdrawal of the remaining breach of contract claim which were before this Tribunal by way of his written representations at the time the costs applications were heard.
10. Effectively, the matters now raised by the claimant were considered in the light of all of the submissions and evidence presented to this Tribunal before the Order for Costs was made.
11. The earlier case law suggests that the interests of justice ground should be construed restrictively. The Employment Appeal Tribunal ("the EAT") in Trimble v Supertravel Ltd [1982] ICR 440 decided that if a matter has been

ventilated and argued then any error of law falls 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 does 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".

12. More recent case law suggests that the "interests of justice" ground 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). This requires the tribunal to give effect to the overriding objective to deal with cases 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 confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.
13. Finally, I turn to the fourth matter, which is the amount of the Order for Costs. The claimant does not challenge the amount of the Order for Costs on the basis that the work was not undertaken by the respondent, or that the amount is itself unreasonable. Rather, the claimant challenges the amount on the basis that he is unable to afford to pay it. The claimant has since submitted a statement of means which suggests that he is impecunious, and effectively relies on a monthly payment from his parents to ensure that his monthly outgoings are not exceeded by his monthly income. Even if correct, this is not information which was not reasonably available at the time of the hearing of the application for costs and which has since come to light. The respondent's solicitors had informed the claimant in advance of their application for costs that the Tribunal would consider his means, and invited him to provide details of the same, which the claimant at that stage declined to do. Indeed, the information now provided largely predates the hearing date of the original application for costs, and it was not presented then.
14. In addition, as explained in paragraph 36 of the Order for Costs, Rule 84 allows the Tribunal to have regard to the paying party's ability to pay, but it does not have to. Furthermore, the fact that a party's ability to pay is limited, does not, however, require the Tribunal to assess a sum that is confined to an amount that he or she could pay (see Arrowsmith v Nottingham Trent University [2011] ICR 159 CA which upheld a costs order against a claimant of very limited means).

15. Accordingly, I refuse the application for reconsideration pursuant to Rules 70 and 72 because there is no reasonable prospect of the original decision being varied or revoked, and it is not in the interests of justice to allow it.

Employment Judge N J Roper
Dated 22 May 2019