EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109518/2018

Held in Glasgow on 8 April 2019 (Reconsideration Hearing in chambers)

Employment Judge: Ian McPherson

Mr Brian Gourlay	**Claimant** **Written Representations** **per the Claimant in person**
GMB	**Respondents** **Written Representations** **per Mr Paul Deans** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) Having considered parties' respective written representations, on the claimant's opposed application for reconsideration of the Strike Out Judgment dated 20 December 2018, and entered in the register and copied to parties on 21 December 2019, striking out the whole of his claim against the respondents, the Tribunal, in terms of **Rules 70 to 72 of the Employment Tribunals Rules of Procedure 2013**, having **reconsidered** that Judgment, in light of the claimant's application dated 3 January 2019, and the respondents' objections dated 21 January 2019, **confirms** the Judgment, without variation, and accordingly **refuses** the claimant's application for reconsideration.

(2) Having done so, and having further considered the respondents' application dated 14 January 2019 for an Expenses Order against the

claimant, in terms of **Rule 75(2) of the Employment Tribunals Rules of Procedure 2013**, following upon the Strike Out Judgment, and their breakdown of costs incurred in the sum of **£5,837.93**, as intimated on 8 February 2019, together with the claimant's objections dated 11 and 20 February 2019, and the respondents' reply of 26 February 2019, the Tribunal proposes, in light of the claimant's request for an oral Hearing, to list the case for an in person Expenses Hearing, estimated duration 3 hours, on a date to be hereinafter fixed by the Tribunal, unless the claimant, **within no more than 14 days of issue of this Judgment,** informs the Tribunal, and the respondents' solicitor, that he now agrees to the opposed application being considered by Employment Judge Ian McPherson, in chambers, on the basis of the written representations already on file, and thus without the need for personal attendance, thus avoiding delay, and saving expense, as per the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly.

REASONS

Introduction

1. This case called again before me on the morning of Monday, 8 April 2019, for a Reconsideration Hearing, previously intimated to both parties by the Tribunal by Notice of Reconsideration Hearing dated 13 February 2019, stating that I had decided that the claimant's application for reconsideration of my Strike Out Judgment issued on 21 December 2018 would take place at a Hearing, without the requirement for parties to attend, and so the Notice of Hearing was issued for their information only.

2. One day was allocated for this Reconsideration Hearing before me, as an Employment Judge sitting alone, in chambers. As per the Notice of

Hearing, parties were advised that, at this Reconsideration Hearing, the Judgment might be confirmed, varied or revoked.

3. The claimant made application, on 3 January 2019, for reconsideration of that Strike Out Judgment. He did so by email to the Glasgow Tribunal office, enclosing a covering letter, and 5 attached appendices, running to 13 pages in total, comprising appendix (1) an apology for his use of the word "***shafted***" in earlier submissions to the Tribunal; (2) an application for extension of time for making the reconsideration application (if required); (3) a narrative setting out why, in his opinion, it would be in the interests of justice to reconsider the Judgment; (4) submitting that something has happened since the Strike Out Hearing, why evidence was not available, and what evidence he wants to introduce ; and (5) email correspondence between the claimant and the Scottish Public Pensions Agency on 2 January 2019.

4. The claimant sent a copy of his correspondence for the Tribunal to Mr Paul Deans, solicitor at Thompsons, Glasgow, as the respondents' representative, as per **Rule 92**. Following that intimation to Mr Deans, he emailed the Tribunal that same day, 3 January 2019, to note that the Judgment had been issued, given the claimant's reconsideration application, but advising that the respondents' copy posted to his office had not been received, and requesting a copy be sent to him directly by email. A copy Judgment was sent to him by a clerk to the Tribunal.

Initial Consideration of Reconsideration Application

5. On 8 January 2019, the claimant's reconsideration application of 3 January 2019 was referred to me for initial consideration. It had been submitted in time, within 14 days of the date that the Judgment was sent to parties on 21 December 2018, and the application set out why reconsideration is necessary. Further, the application had been copied to the respondents' solicitor. As such, it was not appropriate to reject the application, as it complied with **Rule 71**, and I did not need to consider extending time, under **Rule 5**, as it had not been submitted out of time.

6. I did not refuse the application at Initial Consideration, under **Rule 72**, but I gave the respondents 10 days to respond to the application, and for both parties to express their views on whether the application could be considered without a Hearing. I expressed no provisional view on the application, and my instructions were translated into a letter from the Tribunal, sent to both parties, dated 9 January 2019, seeking a reply by 21 January 2019.

7. By email to the Tribunal, and copied to Mr Deans for the respondents, on 16 January 2019, the claimant stated that he was of the view that his application for reconsideration could be determined without a Hearing. Further, by email, sent on 21 January 2019, copied to the claimant, Mr Deans advised the Tribunal that the respondents opposed the claimant's application for reconsideration, made comments on and responded to the claimant's application, and Mr Deans submitted it is not in the interests of justice to grant the reconsideration.

8. Within that response, on 21 January 2019, Mr Deans further stated that there was no need for a Hearing, submitting that it is the respondents' position that given that both parties have set out their positions comprehensively in writing to the Tribunal, and bearing in mind both parties are content for this matter to be dealt with, without a Hearing, that it would be in accordance with the overriding objective for this matter to be dealt with by way of written submissions.

Matter not considered at this Reconsideration Hearing: Expenses Application against the Claimant

9. At this Reconsideration Hearing, I have not considered the respondents' application dated 14 January 2019 for an Expenses Order against the claimant, in terms of **Rule 75(2) of the Employment Tribunals Rules of Procedure 2013**, following upon the Strike Out Judgment, and the claimant's objections to that application.

10. When that expenses application was referred to me, on 16 January 2019, I directed that both parties be asked for their comments on further procedure with regards to both the claimant's application for reconsideration, and the respondents' application for expenses, and whether this case (claim No.2) should be combined with the claimant's new claim No.3 under case number **4122886/2018**.

11. My instructions were translated into an email from the Tribunal, sent to both parties on 24 January 2019, seeking a reply by 31 January 2019. On that same date, 2 January 2019, both parties were sent a letter by the Tribunal, regarding the expenses application, and inviting the claimant to give reasons, by 7 February 2019, why the requested Expenses Order should not be made, or whether he wished to state such reasons at a Hearing.

12. On 31 January 2019, Mr Deans advised the Tribunal, with copy sent to the claimant, that since claim No2 had been struck out, there is no claim which can be combined with claim No3, but should the reconsideration application revive the claim No2, he would welcome the opportunity to comment further at that point. His reply also stated that the respondents' position is that the Tribunal can deal with the application for reconsideration without recourse to a Hearing, and both parties had submitted their position in writing and both had indicated that that matter does not require a Hearing, but can be dealt with on the basis of written submissions.

13. Further, Mr Deans' response submitted that, similarly, it is the respondents' position that their application for expenses can be dealt with without the requirement for a further Hearing, and "***given that this is a relatively straightforward application for expenses arising out of a very clear Judgment of the Tribunal"***, it would be in accordance with the overriding objective for the Tribunal to make this determination without the need for a Hearing.

14. By email of 31 January 2019, copied to the Tribunal, and Mr Deans, the claimant advised that the application for reconsideration could be determined without a Hearing, but he requested a Hearing to state his reasons why the respondents' application for expenses should not be granted but, prior to any such Expenses Hearing, he sought disclosure of pertinent information and documents from the respondents.

15. Following that correspondence from both parties on 31 January 2019 being referred to, and produced at a private Case Management Preliminary Hearing held before me on the morning of 1 February 2019, in claim No.3, being **case no.4122886/2018**, which was linked with, but not combined with, this No.2 casefile, I had a clerk to the Tribunal email both parties, in this case, on my instructions, as follows:

"(1) Parties' correspondence is noted and placed on casefile.

(2) In light of considering further procedure, the Judge has directed that the two files are not combined, but remain linked, for administrative purposes, given the Judge is the allocated Judge in both cases.

(3) Given both parties are content that the claimant's reconsideration application should proceed, on the papers, and without the need for a Hearing, the Judge has instructed that this case be listed for a one-day Reconsideration Hearing before him, in chambers, parties not required to attend, as soon as possible, the Judge's diary and the Tribunal's other listings permitting.

(4) When a date for that Reconsideration Hearing is assigned, parties will be notified, for information only.

(5) It may be, given the exigencies of the daily cause list, that postponement / cancellation of other business diarised for the

Judge, might mean it could be dealt with at an earlier date than indicated, but no guarantee can be given.

(6) As the claimant has not responded to Mr Deans' email of 21 January 2019, at 11:11, intimating the respondents' grounds of objection to the reconsideration application of 3 January 2019, the Judge has ordered that the claimant may provide any further written representations, in reply to Mr Deans' email, within the next 10 days, i.e. by no later than 4.00pm on Monday, 11 February 2019.

(7) A copy of his reply to the Tribunal should be sent at the same time to Mr Deans, by email, as per Rule 92.

(8) At the Reconsideration Hearing, the Judge will take account of parties' written submissions to that date on the reconsideration application.

(9) As regards the respondents' application of 14 January 2019 for an award of expenses against the claimant, further procedure in that opposed application will be determined after the Reconsideration Judgment is issued.

(10) Meantime, having considered the claimant's request for disclosure by the respondents, at item 4 (c) (i) in his email of 31 January 2019, the Judge orders that, within the next 7 days, i.e. by no later than 4.00pm on Friday, 8 February 2019, the respondents' solicitor shall send to the claimant, by email, with copy to the Tribunal, a breakdown of the costs incurred of £5,955, with any relevant supporting vouchers, together with an explanation of the calculation of expenses sought from the claimant.

(11) The claimant's request for further disclosure by the respondents, at item 4 (c) (ii) in his email of 31 January 2019 is refused as being unnecessary, at least at this stage."

16. Thereafter, on 8 February 2019, Mr Deans emailed the Tribunal, with copy to the claimant, with the respondents' breakdown of costs, with supporting vouchers, incurred in the sum of **£5,837.93**, being the sum sought from the claimant by way of the respondents' expenses.

17. Further, on 11 February 2019, the claimant emailed the Tribunal, with copy to Mr Deans, enclosing his response to the respondents' response of 21 January 2019, regarding the reconsideration application, and under reference to 18 attached appendices, extending to some 56 pages in total, and he further submitted that the respondents had "***knowingly provided false and misleading information to ET***".

18. Both parties' correspondence of 8 and 11 February 2019 was acknowledged by the Tribunal, on 13 February 20129, and any written comments on the content of the other party's correspondence was requested by 20 February 2019.

19. Thereafter, on 20 February 2019, the claimant emailed the Tribunal, with copy to Mr Deans, enclosing his comments on Mr Deans' email of 8 February 2019, and in a document extending to 21 typewritten pages, including 5 appendices, he detailed his comments on Mr Deans' correspondence of 8 February 2019, including that he did not recollect getting any Costs Waring letter from the respondents.

20. Further, the claimant challenged the costs sought at **£5837.93,** on the basis that he was being asked to shoulder the financial burden of the respondents having chosen to instruct Mr Crammond, counsel from the English Bar, rather than a solicitor from Thompsons.

21. Further, at paragraph 38 of his comments, on page 12, the claimant specifically stated that:

"If the reconsideration application is unsuccessful

38. In the event that the reconsideration application is unsuccessful and the Tribunal moves to considering whether the expenses application should be granted in the terms sought, the claimant would respectfully ask that a hearing be granted in order that he may advance to the Tribunal the reasons why he believes the sum sought is excessive, having regard to the facts of the matter and his means."

22. On 26 February 2019, a clerk to the Tribunal wrote to both parties, on my instructions, acknowledging the claimant's correspondence of 20 February 2019, and advising that the respondents' opposed application for expenses would be determined by me after the Reconsideration Hearing in chambers on 8 April 2019, and if the respondents' representative had any comments to make on the claimant's email of 20 February 2019, those comments should be sent to the Tribunal, with copy to the claimant at the same time, within the following 7 days.

23. Thereafter, by email on 26 February 2019, from an Elaine Goodwin at Thompsons, copied to the claimant and Mr Deans, at the same time as being sent to the Tribunal, the respondents made comments on the claimant's email of 20 February 2019. All of that correspondence is on the casefile, and awaits my judicial determination at a later date.

24. In light of my decision to refuse the claimant's reconsideration application, and further to the claimant's request for an oral Hearing, I have directed that the respondents' opposed expenses application shall be listed for an in person Expenses Hearing, estimated duration 3 hours, on a date to be hereinafter fixed by the Tribunal, unless the claimant, **within no more than 14 days of issue of this Judgment,** informs the Tribunal, and the respondents' solicitor, that he now agrees to the opposed application being considered by me, in chambers, on the basis of the written representations already on file, and thus without the need for personal

attendance, thus avoiding delay, and saving expense, as per the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly.

25. If the claimant still seeks an Oral Hearing, I shall, in due course, have the clerk to the Tribunal issue date listing stencils to convene such an Expenses Hearing before me in **July, August or September 2019**. If not, I will seek to have the Expenses Hearing conducted, in chambers, before me at the earliest available date in the Listing diary, when I am not otherwise allocated to be sitting in any other case.

Claimant's Application for Reconsideration

26. The claimant's reconsideration application was made on 3 January 2019. Rather than try and sub-edit his work, and provide my own executive summary, it is appropriate, at this stage, to note the full terms of his submission which, so far as material for the purposes of this reconsideration application before the Tribunal, being his appendices 3 and 4, *verbatim*, reads as follows:

> ***Appendix 03: … set out why it would be in the interests of justice for the original decision to be reconsidered.***
>
> *14. The claimant respectfully submits to Employment Judge McPherson that it would be in the interests of justice for the original decision to be reconsidered.*
>
> *15. The claimant refers to, among other things, paragraph 109*
>
> *109: Further, at paragraph 25, the claimant advises that he has submitted a "new claim". This follows upon his paragraph 10, referring to obtaining a fresh ACAS EC certificate on 13 November 2018. If and when the claimant raises a fresh claim against these respondents, then that new claim will go through the standard process of acceptance, notice of claim, ET3 response, and then Initial*

Consideration, and any further procedure that might be appropriate. That new claim is not a matter for me in this Judgment, although, for reasons of judicial continuity, it is likely to be allocated to me by the Tribunal administration for case management.

16. The claimant respectfully proposes the notion that it would be in the interests of justice for the original decision to be reconsidered as having claims struck out, as has occurred on 2 occasions, restricts a claimant from e.g. raising a victimisation claim.

17. The claimant does respectfully consider the matter of being unable to refer to previous matters whilst having been judicially dealt with, is not it is respectfully proposed, in the interests of justice.

18. In regard the above 'new claim' referred to in Judgment at paragraph 109 a claim has been submitted at 14/11/18 with ET1 submitted to ET Glasgow at Wed 14/11/2018 13:18. This ET1 has been assigned reference 4122886/2018.

19. 4122886/2018 does rely on, for purposes of e.g. victimisation, acts passed i.e. on matters already litigated on.

20. In essence the claimant's complaints against GMB are in regard not only what the respondent has done but importantly what the respondent GMB has NOT done i.e. inactions / omissions.

21. This can be demonstrated in that the claimant, at 04 March 2014 19:19, did provide Mr Douglas Japp, Head of Employment law at Digby Brown, Mr Hemsi Solicitor at Digby Brown, Billy McEwan GMB Convenor at WDC and GMB's Heather Agnew, among other things, a PDF titled, To Whom it may Concern.

22. Digby Brown then proceeded to dispute the claimant's medical illness of Multiple Sclerosis in papers to ET Glasgow.

23. After providing that same document To Whom it may Concern to Mr David Martyn, Head of Employment law at Thompsons and

various GMB Officers the claimant's medical illness of Multiple Sclerosis was again disputed in papers to ET Glasgow. That is: it is respectfully proposed that false and misleading information has been demonstrably provided by GMB's legal representative to ET Glasgow.

24. Subsequently Thompsons have since accepted, the already provided to the respondents, To Whom it may Concern correspondence as supporting evidence of Multiple Sclerosis.

25. Furthermore – having struck out the claimant's claim without recourse to other options as detailed in case law, within the Judgment, the claimant respectfully proposes the notion that he has been disadvantaged e.g. the 'cease & desist letter' signed by Mr David Martyn of Thompsons does contain factual inaccuracies.

26. With his claim having being struck out the claimant has been denied the opportunity to prove to Employment Judge McPherson that the content of the cease & desist letter contains factual inaccuracies.

27. In this regard the claimant respectfully proposes that it is in the interests of justice for the original decision to be reconsidered please.

***Appendix 04: … something has happened … evidence was not available … the evidence which you want to introduce**.*

28. Excerpt from The Judgment: 'something has happened since the hearing which makes the judgment or decision unjust. If you apply for a reconsideration based on new evidence you must explain why the evidence was not available before and include a full statement of the evidence which you want to introduce.'

29. Whilst the clamant does, respectfully, disagree with the Judgment the claimant does recognise that does not mean a judgment or decision will be reconsidered just because the claimant disagrees with it

30. The claimant respectfully proposes that something has happened since the hearing which makes the judgment or decision unjust.

31. The claimant advises that 'something has happened'. This includes the submission of new claim Case Number 4122886/2018 with PHA due soon and PH scheduled 1 FEBRUARY 2019 AT 10:00 AM.

32. Furthermore, 'something that has happened' is that SPPA and the claimant have communicated. The claimant proposes the notion that his trade union GMB should have meaningfully dealt with the claimant's concerns in regard pension entitlements. Reference is made to Appendix 05.

why the evidence was not available before

33. The claimant respectfully advises Employment Judge McPherson that the evidence was not available 'before' due to, among other things, timeline of events and Judicial process overlap.

34. 4122886/2018 submitted at Wednesday 14/11/2018 13:18 with ET1 paper apart sent to ET Glasgow at 14/11/2018 13:18.

35. 'Ochieng' submission made at Wed 14/11/2018 15:00 in Word document Gourlay v GMB 4109518-2018 - EJ McPherson 07 November 2018 order re comments - submitted Wednesday 14 November 2018.

***a full statement of the evidence which you want to introduce**.*

36. The claimant respectfully advises Employment Judge McPherson that he would refer to, as evidence to introduce, the 4122886/2018 ET1 paper apart and e.g. Appendix 05 herein whereby the claimant's pension issues have been ongoing.

37. *That is: a GMB member with Multiple Sclerosis has been contacting his trade union GMB for support in a pension issue – all the while the chair of the LGPS Strathclyde Pension Fund being a GMB member.*

38. *Noting that pension arrangements are for Brian Gourlay i.e. a GMB member / ex WDC employee suffering Multiple Sclerosis whereby WDC did NOT advise the claimant of his LGPS entitlement in regard, among other things, provision of advice on how to appeal; whom to appeal to; timescales in which to submit an appeal etc. In essence: GMB have left a member suffering, among other things, Multiple Sclerosis to get on with matters himself. And, all the while, GMB have stepped back from the matter and allowed, by their inactions / omissions, the state of affairs to persist.*

39. *Further: all the while the cease & desist letter did impose conditions on the claimant, with Multiple Sclerosis, whereby the claimant was, in essence, denied his membership entitlements under GMB Rules and threatened with e.g. Police if he continued to contact GMB.*

40. *The claimant respectfully submits this paper as an application for permission to amend the 4122886/2018 ET1 paper apart. This is with a view to anticipating that GMB shall submit res judicata and go for strike-out once again.*

41. *Thus, at Thursday, 03 January 2019 the claimant pre-empts that GMB action and requests permission to make application to amend ET1 in 4122886/2018. If permitted the claimant shall amend 4122886/2018 and remove all other aspects but, the claimant believes, that may make the 4122886/2018 victimisation aspects difficult to prove.*

42. *Judgment at paragraph 164 states, among other things, "the terms of that letter from Thompsons explain why they have taken that action on behalf of their clients at the GMB."*

43. *The claimant respectfully advises Employment Judge McPherson that the cease & desist letter does contain 'factual inaccuracies.*

44. By striking out the claim the claimant has been denied the opportunity to test the content of the 'cease & desist' letter.

45. At 15 January 2016 Gary Smith GMB Scotland Secretary advised the claimant, among other things, at page 1 paragraph 2, -

46. In relation to your complaint about the advice that Digby Brown gave GMB Scotland about the prospects your case had of succeeding and whether you should have been offered legal assistance to pursue a claim in the Employment Tribunal Thompsons solicitors have reviewed this advice. They agree with Digby Brown's assessment of your potential claims, i.e. that they didn't have reasonable prospects of success which we deem to be more than 50% chance of success. They deem the advice Digby Brown gave GMB about your case, including the advice communicated to you by letter dated 05 March 2014 [from Mr Hemsi 08/03/14 at 14.30 (by post)], to be competent advice. To be clear this covers the advice that GMB received about your potential claims up to March 2015. This doesn't prevent a further assessment being made about any potential claims you may have that have arisen since then, for example if your appeal against your dismissal is not successful.

'up to March 2015' states Gary Smith

47. It is respectfully proposed that the 15 January 2016 Gary Smith GMB Scotland Secretary letter to the claimant provides demonstrable evidence that the 01/02/18 cease & desist letter contains false and misleading information.

48. Gary Smith at 15 January 2016 states, among other things, "To be clear this covers the advice that GMB received about your potential claims up to March 2015".

49. The claimant proposes the notion that GMB have NOT professionally assessed e.g. at 15 January 2016 the 12 April 2015 claim 4106122/2015. That is: 4106122 HAS NOT BEEN assessed by

a competent employment lawyer and/or someone competent in EqA Act.

50. That is, contrary to the Gary Smith 15 January 2016 letter to the claimant and the associated application to amend 122 titled, 'Gourlay v WDC 4106122-2015 - 'application to amend ET1' - submitted Monday, 21 December 2015' the 01/02/18 – the cease & desist letter is wholly factually inaccurate.

51. Cease & desist at paragraph 2, "Your requests for legal assistance were considered in line with the GMB's usual process; these requests were declined because the GMB were advised that your claims had no reasonable prospect of succeeding.

52. Furthermore: the claimant proposes the notion to Employment Judge McPherson that GMB have NOT professionally assessed i.e. by a competent employment lawyer and/or someone competent in EqA Act, what became the claimant's 137 claim, submitted 20 January 2016, in regard dismissal.

53. Examples of e.g. factual inaccuracies and embellishments in the cease & desist letter are numerous.

54. By striking out the claim the claimant respectfully proposes he has been denied testing these matters at a full hearing. The claimant has been denied providing further and better particularisation.

55. At Thu 05/11/2015 at 12:52 the claimant sent a text to Mick Conroy GMB FTO -

> *Mick, I have been given a letter from ET today for which I need to know what's happening re Appeal and whether GMB are providing legal support or not regard my dismissal. Excerpt: the tribunal has asked "whether to bring an entirely new claim before the Tribunal, after EC notification to Acas, or to seek leave to amend this existing claim". I must have legal advice*

before responding to EJ McPherson. Can you or someone at GMB please contact me? Thanks. Brian.

56. Despite numerous phone calls and emails days and weeks passed.

57. At Thu 19/11/2015 at 08:04 the claimant sent a text to Mick Conroy GMB FTO -

Previously sent 05 November 2015:

Mick, I have been given a letter from ET today for which I need to know what's happening re Appeal and whether GMB are providing legal support or not regard my dismissal. Excerpt: the tribunal has asked "whether to bring an entirely new claim before the Tribunal, after EC notification to Acas, or to seek leave to amend this existing claim". I must have legal advice before responding to EJ McPherson. Can you or someone at GMB please contact me? Thanks. Brian.

58. At Thu 19/11/2015 at 09:53 Mick Conroy text the claimant with -

Hi will phone you in the afternoon in a meeting just now and let you know what to do sorry for not getting back to you

Mick

59. Suffice it to note the claimant heard nothing further. There was no phone call from Mick Conroy or anyone else at GMB.

60. At Mon 21/12/2015 23:37 the claimant submitted, to ET Glasgow fao Employment Judge McPherson Word document titled, 'Gourlay v WDC 4106122-2015 - 'application to amend ET1' - submitted Monday, 21 December 2015 a.'

61. That is: GMB without advising the claimant of their intentions either to provide advice or otherwise left the claimant in a state of anxiety and trepidation etc i.e. to get on with things himself.

62. Suffice it to note the claimant having heard nothing further the claimant submitted Gourlay v WDC 4100137/2016 at 20 January 2016.

63. That is: contrary to the 01/02/2018 cease & desist letter This doesn't prevent a further assessment being made about any potential claims you may have that have arisen since then, for example if your appeal against your dismissal is not successful.

64. In essence: the claimant was NOT engaged with in regard 'potential claims' that subsequently had arisen with appeal against dismissal being not successful. And GMB despite requests did not obtain the minutes for the claimant from his 6 days at Appeal against dismissal without notice i.e. not until Mr Ettles provided those minutes to Ms Dalziel at 26 October 2018 12:54. That is: over 2 years later the claimant did receive minutes consisting of circa 125 pages – but not from GMB.

makes the judgment or decision unjust

65. The claimant respectfully proposes that striking out a claim for victimisation which does have to rely on previous matters i.e. to prove victimisation makes a judgment or decision unjust.

Less is more

66. The claimant respectfully advises that he had purposively endeavoured to adhere to the 'less is more' concept in his original ET1 paper apart for 4109518/2018. The claimant did believe that aspects for 'six honest serving men' had been fulfilled in regard the 01/02/2018 cease & desist letter in 4109518/2018 ET1 paper apart.

67. The claimant's concerns with GMB have been in regard their acts and omissions.

68. The claimant would have expected to have been required to provide demonstrable evidence to prove acts and omissions (inactions) of GMB.

27. I have not reproduced all of his written submissions because (a) the full copy is held on the casefile, and I have read it, and I had access to it when preparing this Judgment and Reasons, and (b) it is disproportionate to do so regarding items, at appendices 1, 2 and 5, which are not material for my judicial determination of his application for reconsideration of my earlier Strike Out Judgment issued on 21 December 2018.

Respondents' Objections

28. The respondents' objections to the claimant's application were intimated by Mr Deans, on 21 January 2019. Again, rather than try and sub-edit his work, and provide my own executive summary, it is appropriate, at this stage, to note the full terms of his submission which, *verbatim*, reads as follows:

"We write in relation to the above noted case and in response to the Tribunals' correspondence dated 9 January 2019, to provide the Respondent's response to the Claimant's application for reconsideration of the judgment dated 21 December 2018.

Response to application to reconsider

The Tribunal will be aware that it will only reconsider a judgment where it is necessary in the interests of justice to do so. In the present case, the Claimant has not given grounds upon which the Tribunal can reasonably conclude that something has gone wrong at or in connection with the hearing, nor that something relevant and significant has occurred since the hearing which makes the judgment

unjust. Consequently, it is not in the interests of justice to reconsider the judgment.

Although the Respondent is of the view that much of what the Claimant has set out in his application for reconsideration does not support his application for reconsideration and/or is not relevant to the present matter, to assist the Tribunal in its deliberations, the Respondent has sought to comment on and respond to the Claimant's averments in detail.

For the reasons set out below, it is not in the interests of justice to grant the reconsideration:

Appendix 1 & 2

The Respondent does not propose to comment on paragraphs 1 – 15 of the Claimant's application for reconsideration which concerns itself with an apology and an application for extension of time.

Appendix 3

At paragraph 16 - 19, the Claimant suggests that the original decision should be reconsidered since having claims struck out restricts him from raising a victimisation claim. Strike out of this claim does not prevent such a claim being raised. This is demonstrated by the fact that the Claimant already has a claim for victimisation lodged against the Respondent (4122886/2018).

At paragraph 20, the Claimant refers to alleged acts/omissions by the Respondent. These have been litigated on two occasions, 414108638/2015 and 4109518. It is res judicata and or an abuse of process to seek to re-litigate these matters. In any event, the Claimant does not set out what the alleged acts or omissions were, nor why these are relevant or should be considered in his present application.

At paragraph 21-22, the Claimant refers to the acts of law firm Digby Brown. It is submitted that their acts or omissions, which appeared to

occur in 2014, have no relevance or bearing on the present matter. Neither is Digby Brown the Respondent or an agent for the Respondent.

At paragraphs 23-27, the Claimant refers to a cease and desist letter he received from Thompsons solicitors. Firstly, the Respondent does not accept that there were factual inaccuracies in that letter, and secondly, in any event, the reasons for sending the letter were clearly set out in the letter. In the present judgment, the Tribunal made a very clear finding that the Claimant had no reasonable prospect of convincing a Tribunal that the issue of that letter was an act of discrimination by the Respondent. Consequently, the Claimant has given no basis on which the Tribunal's conclusion on this matter should be revisited, nor why it is relevant to the present application for reconsideration.

Appendix 4

At paragraphs 28-31 the claimant submits that "something has happened" since the hearing which makes the judgment or decision unjust, and that this "something" is his lodging of a further claim against the Respondent. The fact that the Claimant has chosen to instigate further litigation against the Respondent does not in any way impact on the correctness of the Judgment in the present matter.

At paragraph 32 he states that he has communicated with the Scottish Public Pensions Agency and at paragraph 36 he refers to recent (January 2019) communications with SSPA. The fact that the Claimant has recently communicated with his pension provider (who is not the Respondent), has no relevance to, or impact on the present judgment. Neither does the Claimant explain why he believes this to be pertinent to his application for reconsideration.

At paragraph 38-39, the Claimant refers to inactions of his previous employer (WDC) and alleged inactions of the Respondent. For the avoidance of doubt, it is denied that any action or inaction of the

Respondent was in any way because of or connected to the Claimant's disability. In any event, none of this is relevant to the determination of the present judgment. Neither does the Claimant explain why he believes this to be pertinent to his application for reconsideration.

At paragraph 40, the Claimant makes an application to amend his claim 4122886/2018. The Respondent will address this application as part of its Agenda in the 4122886/2018 case, as directed by the Tribunal.

With regard paragraphs 42-44, 47 in relation to the cease and desist letter, the Respondent reiterates its position as set out above.

With regard paragraph 45-46 and 48-52, the Claimant appears to complain about legal advice dating back to 2016. It is submitted that any claim arising from such advice is significantly time barred, and that any acts or omissions by the Respondent were in no way because of or connected to the Claimant's disability. None of this is relevant to the determination of the present judgment and the Claimant has failed to explain why he believes this to be pertinent to his application for reconsideration.

At paragraph 55-59, the Claimant appears to complain about the acts or omissions of GMB during late 2015. Any claim arising from such act or omissions is significantly time barred, and any acts or omissions of the Respondent are in no way because of or connected to the Claimant's disability. In so far as the Claimant seeks to re-litigate matters already litigated, this is res judicata and / or an abuse of process. Moreover, none of this is relevant to the determination of the present judgment and the Claimant has failed to explain why he believes this to be pertinent to his application for reconsideration.

At paragraph 60 - 62, the Claimant refers to case 4106122/2015 and 4100137/2016 which appears to have been lodged against his former employer, WDC. It is denied that the Respondent is liable for any act or omission of WDC. In so far as any act or omission alleged against

the Respondent, the Respondent denies that these were in any way because of or connected to the Claimant's disability. Any claim arising from the alleged act/omission is time barred and it is not relevant and has no bearing on the present matter.

At paragraph 64 the Claimant alleges that the Respondent failed to obtain minutes from an appeal against dismissal meeting. For the avoidance of doubt, any alleged act or omission of the Respondent (if it did occur), was in no way because of or connected to the Claimant's disability. Any claim arising from the alleged act/omission is time barred and it is not relevant to and has no bearing on the matters to be considered by the Tribunal with regard the application for reconsideration. Neither has the Claimant explained why he believes this to be pertinent to his application for reconsideration

With regard paragraphs 66-68, the Respondent believes that its position has been made clear and does not propose to comment further on this."

Issue for determination by the Tribunal

29. The only live issue for determination at this in chambers Reconsideration Hearing was the claimant's application for reconsideration of my Strike Out Judgment issued on 21 December 2018, and the respondents' objections to that application.

Relevant Law: Reconsideration

30. Neither the claimant, nor Mr Deans, addressed me on the relevant law on reconsideration in their respective written submissions. For the claimant, as an unrepresented party litigant, other than his reference to the guidance in "***The Judgment"*** booklet, that was perhaps not to be expected, albeit in many other Hearings before me over the last few years, he has provided case law authorities, and written submissions addressing relevant statutory provisions too.

31. What was more surprising is that Mr Deans' submissions for the respondents did not address the relevant law, other than, in the most superficial terms, referring to a reconsideration needing to be in the interests of justice, and so I have had to give myself a self-direction in that regard.

32. The reconsideration application requires to be dealt with as per **Rules 70 to 73 of the Employment Tribunals Rules of Procedure 2013**. As this was an application by the claimant, **Rule 73**, relating to reconsiderations by the Tribunal on its own initiative, does not fall to be considered further. Further, as always, there is the Tribunal's overriding objective, under **Rule 2,** to deal with the case fairly and justly.

33. The previous Employment Tribunal Rules 2004 provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the current 2013 Rules is that the judgment can be reconsidered where it is necessary "***in the interests of justice***" to do so. That means justice to both sides.

34. However, it was confirmed by HHJ Eady QC in **Outasight VB Limited v Brown [2014] UKEAT/0253/14/LA,** now reported at **[2015] ICR D11,** that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the 2013 Rules and, therefore, I have considered the case law arising out of the 2004 Rules.

35. The approach to be taken to applications for reconsideration was also set out more recently in the case of **Liddington v 2Gether NHS Foundation Trust [2016] UKEAT/0002/16/DA** in the judgment of Mrs Justice Simler, then President of the EAT. The Employment Tribunal is required to:

> "1***. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;***

2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and

3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision. "

36. In paragraph 34 and 35 of the Judgment, the learned EAT President, Mrs Justice Simler, stated as follows:

34. In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being

tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35. Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly.

37. There is a public policy principle that there must be finality in litigation and reviews or reconsiderations are a limited exception to that principle. In the case of **Stephenson v Golden Wonder Limited [1977] IRLR 474** it was made clear that a review (now a reconsideration) is not a method by which a disappointed litigant gets a "***second bite of the cherry***". Lord Macdonald, the Scottish EAT Judge, said that the review provisions were "***not intended to provide parties with the opportunity of a rehearing at which the same evidence can be rehearsed with different emphasis, or further evidence produced which was available before".***

38. The Employment Appeal Tribunal went on to say in the case of **Fforde v Black EAT68/80** that this ground does not mean "***that in every case where a litigant is unsuccessful 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 even more exceptional cases where something has gone radically wrong with the***

procedure involving the denial of natural justice or something of that order."

39. "***In the interests of justice***" means the interests of justice to both sides. The Employment Appeal Tribunal provided further guidance in **Reading v EMI Leisure Limited EAT262/81** where it was stated "***when you boil down what it said on [the claimant's] behalf it really comes down to this: that she did not do herself justice at the hearing so justice requires that there should be a second hearing so that she may. Now, "justice", means justice to both parties. It is not said, and, as we see it, cannot be said that any conduct of the case by the employers here caused [the claimant] not to do herself justice. It was, we are afraid, her own inexperience in the situation."***

40. The 2013 Rules came into force on 29 July 2013 and introduced the new concept of reconsideration of judgments rather than a review of judgments as it was entitled under the previous 2004 Rules of Procedure. In the 2004 Rules there were five grounds on which a review could be sought and the last of the five was the single ground that now exists for a reconsideration under the 2013 Rules namely that the interest of justice render it necessary to reconsider.

41. I consider that any guidance on the meaning of "***the interests of justice***" issued under the 2004 Rules (and the earlier Rules) is still relevant to reconsiderations under the 2013 Rules. I also remind myself that the phrase "***in the interests of justice***" means the interests of justice to both sides.

42. Further, I have also reminded myself of the guidance to Tribunals in **Newcastle upon Tyne City Council – v- Marsden [2010] ICR 743** and in particular the words of Mr Justice Underhill when commenting on the introduction of the overriding objective (now found in **Rule 2** of the 2013 Rules) and the necessity to review previous decisions and on the subject of a review:

"***But it is important not to throw the baby out with the bath-water. As Rimer LJ observed in Jurkowska v Hlmad Ltd. [2008] ICR 841, at para. 19 of his judgment (p. 849), it is "basic" "… that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."***

The principles that underlie such decisions as Flint and Lindsay remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation – or, as Phillips J put it in Flint (at a time when the phrase was fresher than it is now), the view that it is unjust to give the losing party a second bite of the cherry – seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a tribunal's decision on a substantive issue as final (subject, of course, to appeal").

43. Further, I have considered the further guidance on the 2013 Rules from HH Judge Eady QC in her judgment in **Outasight VB Limited –v- Brown [2014] UKEAT/0253/14**. I have considered that guidance and in particular have noted what is said about the grounds for a reconsideration under the 2013 Rules:

"In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the

> ***interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".***

44. In considering this reconsideration application, I have taken into account the helpful judicial guidance provided by Her Honour Judge Eady QC, EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v Rochdale Metropolitan Borough Council [2018] UKEAT/0032/17**, at paragraph 22, when considering the relevant legal principles, where she stated as follows (underlining is my emphasis): -

> ***"The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."***

45. **Outasight VB Ltd v Brown** is, of course, an earlier EAT authority **[2014] UKEAT/0253/14**, now reported at **[2015] ICR D11**, also by HHJ Eady QC, where at paragraphs 27 to 38, the learned EAT Judge reviewed the legal principles. The EAT President, then Mr Justice Langstaff, in **Dundee City**

Council v Malcolm [2016] UKEATS/0019-21/15, at paragraph 20, states that the current Rules effected no change of substance to the previous Rules, and that they do not permit a claimant to have a second bite of the cherry, and the broader interests of justice, in particular an interest in the finality of litigation, remained just as important after the change as it had been before.

46. Further, I have also taken into account the Court of Appeal's judgment, in **Ministry of Justice v Burton & Another [2016] EWCA Civ.714**, also reported **at [2016] ICR 1128**, where Lord Justice Elias, at paragraph 25, refers, without demur, to the principles "***recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."***

47. Further, at paragraph 21 in **Burton**, Lord Justice Elias had stated that:

> ***"An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily…"***

Discussion and Deliberation: Reconsideration

48. I have now carefully considered both parties' written submissions, and also my own obligations under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly.

49. I consider that both parties have been given a reasonable opportunity, in advance of this Reconsideration Hearing in chambers, to make their own

written representations seeking, and opposing, as the case may be, the claimant's application for reconsideration of my earlier Strike Out Judgment issued on 21 December 2018.

50. There is no dispute that my earlier Strike Out Judgment issued on 21 December 2018 is a Judgment as defined in **Rule 1(3) (b) of the Employment Tribunals Rules of Procedure 2013**. It finally disposed of the claimant's claim against the respondents, by striking out the whole claim.

51. On the test of ***"in the interests of justice",*** under Rule **70**, which is what gives this Tribunal jurisdiction in this matter, there is now only one ground for "***reconsideration***", being that reconsideration "***is necessary in the interests of justice***." That phrase is not defined in the **Employment Tribunals Rules of Procedure 2013,** but it is generally accepted that it encompasses the five separate grounds upon which a Tribunal could "***review"*** a Judgment under the former **2004 Rules**.

52. While there are many similarities between the former and current Rules, there are some differences between the current **Rules 70 to 73** and the former **Rules 33 to 36**. Reconsideration of a Judgment is one of the two possible ways that a party can challenge an Employment Tribunal's Judgment. The other way, of course, is by appeal to the Employment Appeal Tribunal.

53. **Rule 70** confers a general power on the Employment Tribunal, and it stands in contrast to the appellate jurisdiction of the Employment Appeal Tribunal ("***EAT***"). In most cases, a reconsideration will deal with matters more quickly and at less expense than an appeal to the EAT.

54. After most careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to above, in my self-direction, I am satisfied that this is one of those cases where, on reconsideration, it is appropriate to confirm my earlier decision to Strike Out the whole of the claim without the case proceeding to be determined on its merits at a Final Hearing.

55. I do so because despite the claimant's renewed submissions that I should not have granted that Strike Out, but allowed the case to go forward to a Final Hearing, I am satisfied that the legal arguments submitted by Mr Deans, solicitor for the respondents, are well-founded, and must prevail over the claimant's contrary submissions to me.

56. In his submissions for the respondents, Mr Deans succinctly stated that:

> ***"In the present case, the Claimant has not given grounds upon which the Tribunal can reasonably conclude that something has gone wrong at or in connection with the hearing, nor that something relevant and significant has occurred since the hearing which makes the judgment unjust. Consequently, it is not in the interests of justice to reconsider the judgment."***

57. I agree with Mr Deans' submission. There is nothing in the claimant's submissions to me that establishes that something has gone wrong at or in connection with the original Strike Out Preliminary Hearing, nor that something has happened since the Strike Out Hearing in this case which makes my Strike Out Judgment unjust.

58. Further, it seems to me to be in the interests of justice, and consistent with Tribunal's overriding objective, that this case, struck out by my previous Judgment, should remain struck out, and that is why I have decided to refuse the claimant's application and confirm my previous decision to strike out the whole claim, without variation.

59. Strike Out of claim No.2 does not prevent the claimant from raising a victimisation claim against the respondents, as indeed he has done in claim No.3, case no. **4122886/2018,** lodged on 14 November 2018, where the respondents' opposed application to Strike Out that new claim, which failing a Deposit Order, is the subject of an in chambers Preliminary Hearing scheduled for 9 April 2019.

Further Procedure

60. Given my decision to confirm strike out the whole of this claim, there is no further procedure to be determined by the Tribunal, other than the matter of the respondents' opposed application for expenses against the claimant. I have dealt with that earlier in these Reasons, and in paragraph (2) of my Judgment above, so I need say nothing further here.

Employment Judge **Ian McPherson**

Date of Judgment **29 April 2019**
Entered in register
and copied to parties **01 May 2019**