IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Determination of Application, at the instance of the claimant for an Expenses Order issued in Case No 4104862/2017 following Hearing at Edinburgh on 2 July 2019 at 10 am

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Miss C McFadden	**Claimant** **Represented by** **Mr S Healey, Solicitor**
Deer Park Golf & Country Club Ltd	**Respondent** **Represented by** **Mr K McGuire, Advocate**

DETERMINATION OF THE TRIBUNAL

The Tribunal, having heard parties in support of and in opposition to the claimant's motion for an expenses order, in respect of the expenses occasioned by the claimant's opposition to the respondent's application for Reconsideration of the Tribunal's judgment of 17 July 2018:

(First) Refuses the Application.

REASONS

1. The application is one in which the claimant seeks an order for expenses restricted to those occasioned by the claimant's opposition of the respondent's, ultimately unsuccessful, application for Reconsideration of the Tribunal's judgment of 17 July 2018. It is made in reliance upon paragraphs 75(1)(a) and 76(1)(a) and or 76(1)(b) of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("Rules 75 and 76").

2. The claimant was represented by Mr Healey, Solicitor; the respondent by Mr McGuire, Advocate.

Summary of Submissions for the Claimant (in support of the application)

3. For the claimant Mr Healey submitted that the application fell to be regarded as competently falling within the terms of both Rule 76(1)(a) and 76(1)(b).

4. He noted:-

- that "the Claim" was defined in the interpretation clause as meaning "any proceedings before an Employment Tribunal making a complaint"

- that "complaint" was defined in the same paragraph as meaning "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal"

- He submitted, on the basis of such definitions, that an application for Reconsideration made in terms of Rule 70 fell to be regarded as a complaint which in turn fell to be regarded as falling within the definition of "claim", for the purposes of a Rule 76(1)(b) expenses application.

5. In relation to 76(1)(a) Mr Healey submitted, separately and in any event, that a Rule 70 application for Reconsideration of a judgment fell within the definition of "proceedings", notwithstanding the fact that that term was not defined in the interpretation paragraph of the relevant Schedule.

6. While confirming that he founded principally upon section 76(1)(a), Mr Healey submitted that the grounds of application, under either sub-Rule, in essence came to the same thing;

   (a) In relation to Rule 76(1)(b), let it be assumed that the terms of that sub-section embraced an application for Reconsideration, the application was made on the grounds that the application for Reconsideration of the Tribunal's judgment "had no reasonable prospect of success".

   (b) Separately, in terms of Rule 76(1)(a), the application was made on the grounds that the respondent had conducted the proceedings (or a part thereof) by reason of bringing and insisting upon an application, for reconsideration of the Tribunal's judgment, which enjoyed no reasonable prospect of success, "otherwise unreasonably".

   (c) It was through that absence of reasonable prospect of success that the unreasonableness of the conduct founded upon was constituted.

7. Thus, submitted Mr Healey, the Tribunal's jurisdiction and discretion to make an order was awakened. In circumstances where the grounds of objection to the Reconsideration Application advanced at the hearing were the same as those immediately given notice of when the Rule 70 Application was made and which

had been accompanied by a costs warning, Mr Healey invited the Tribunal, let it be assumed the Tribunal accepted the submission that the Rule 70 Application has enjoyed no reasonable prospect of success, to exercise its discretion in favour of making the expenses order.

8. The Account of Expenses submitted was one prepared in accordance with the Act of Sederunt Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993 Order. He commended the total sum brought out under it as an appropriate amount inviting the Tribunal to make the order in that sum of £1,281:66 without the need for taxation.

9. In relation the unreasonable conduct of proceedings, the claimant's representative highlighted and relied upon 3 matters:-

    (a) The claimant's written grounds of opposition to the application for Reconsideration, intimated to the respondents on 16 September 2018;

    (b) The Tribunal's 16 January 2019 Determination and refusal of the application for Reconsideration including its holding that the threshold test of "*necessary in the interests of justice to do so*" was not met in respect of any of the three grounds on which the Reconsideration was sought; and

    (c) The sifting out by the EAT of the appeal (advanced on grounds identical to that upon which review was sought) on the basis that the same disclosed no appealable point of law,

10. Standing the above, the claimant's representative submitted that the application for Reconsideration fell, in hindsight, to be regarded as an application which enjoyed no reasonable prospect of success. The same equally as at the date of its being brought by the respondent on 25 July 2018, as at the date of the respondents' insistence upon it in the face of and as at the date of intimation of the claimant's

written grounds of objection on 16 September 2018; and, as at hearing on 16 January 2019. That insistence, in those circumstances constituted unreasonable conduct of proceedings.

11. In this regard the claimant's representative suggested that upon an objective consideration of the Tribunal's judgment it should have been apparent to the respondent that their application for Reconsideration, on the grounds upon which it was advanced, would necessarily fail.

12. Under reference to the guidance given by Lord Macdonald in ***Fforde v Black*** UKEAT/68/80, as quoted at paragraph 17 of the Reconsideration judgment, namely that "*review on the grounds of necessity in the interests of justice will generally only apply where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order"*, Mr Healey submitted that:-

    (a) A party bringing an application, particularly a party who has the benefit of legal representation, is assumed to have properly directed themselves in law, and to bring that application in the knowledge of the applicable law;

    (b) That in making the application for Reconsideration the respondent should have had in contemplation the high threshold test as set out in ***Fforde v Black*** when determining whether there was a meritorious basis for a Reconsideration application;

    (c) Insofar as the application for Reconsideration was predicated upon an assertion that the Tribunal had misdirected itself in law, the respondents should at least have had in contemplation that the Tribunal might consider an application for Reconsideration to be an inappropriate vehicle for correction of the same particularly in the light of the concurrently raised appeal upon the same grounds;

(d) Insofar as the application for Reconsideration was predicated upon matters already argued before the Tribunal at first instance, that the same decision maker would be highly unlikely to come to a different view in those circumstances;

(e) That the respondent should have known that the application was unlikely to succeed at the time it was brought;

(f) That while to act unreasonably does not require a conclusion that no reasonable party would have acted in the manner criticised the claimant contends that that higher threshold would in fact be met in the instant case.

13. On the above basis Mr Healey invited the Tribunal to conclude that the respondents' application for Reconsideration should be regarded as always having had no reasonable prospect of success. Upon that basis of fact he submitted, that the Tribunal should further hold that, in bringing and insisting upon an application which enjoyed no reasonable prospect, the respondent had acted unreasonably in terms of Rule 76(1)(a) and that thus; the threshold test for awakening the Tribunal's discretion to make an award of expenses was met.

14. If the Tribunal were in agreement with that primary proposition then, submitted Mr Healey, it still required to exercise its discretion as to whether or not to make an award of expenses. In this regard the Tribunal should direct itself as guided in ***Yerrakalva*** (at paragraph 41) vis:-

> "*41 the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. …..*"

15. Without prejudice to that generality he submitted that the position could be summarised in that regards as follows:-

    (a) That the unreasonable conduct was the bringing of and thereafter persistence in, the reconsideration application;

    (b) The conduct was unreasonable, because the Reconsideration application had no reasonable prospects of success (or alternatively that it was obvious that it was unlikely to succeed), based upon the knowledge that the respondent had or can be taken to have had; and

    (c) That the effect which that conduct had, was that the claimant was put to unnecessary cost and expense in responding to the application, as well as being causative of the delay referred to above.

Summary of Submissions for the Respondent (in opposition to the application)

Procedural Overview

16. Counsel for the respondent, Mr McGuire, opposed the application submitting as follows:

    (a) That the making of application for Reconsideration of a judgment was specifically provided for within the Rules and was a legitimate part of process. Rule 70, as a matter of definition allowed for reconsideration of evidence already led during the hearing following which judgment was entered.

    (b) That the request to reconsider evidence already led at a hearing cannot be construed, *per se*, as unreasonable conduct for the purposes of a Rule 76 application. Likewise, an application for reconsideration which proceeds on an assertion that the Tribunal has erred in law, being something which competently falls within the ambit of the Tribunal's

Rule 70 reconsideration power, cannot be construed, *per se*, as "unreasonable conduct" for the purposes of Rule 76 application.

(c) Further, an application for Reconsideration which is advanced on the grounds that the Tribunal has failed to fully consider the import and effect of a case authority to which it was referred or to fully explain its reasoning for a part of its decision cannot, of itself, constitute unreasonable conduct for the purposes of a section 76 application.

Competency of the Application

17. Mr McGuire primarily submitted that the application for an expenses order could not be competently made in reliance upon either Rule 76(1)(a) or 76(1)(b).

In relation to 76(1)(b) (*vis*) "*and shall consider whether to do so, where it considers that* –

(a) any claim or response had 'no reasonable prospect of success' applied, in its express terms, to the absence of reasonable prospects of success in relation to any 'claim' or 'response'. It never had been argued and could not be argued that the respondents' response in the case had no reasonable prospect of success. No presumption in law to that effect arose from the fact that the claimant was ultimately successful.

(b) The claimant's argument that the term "claim", where it appears in Rule 76(1)(b), should be construed, with the effect of reading into the provision the words "or application for reconsideration" was unsubstantiated and should be rejected. The wording of the provision was clear and unambiguous. There was no requirement to read into it the additional words proposed by the claimant's representative, in order to give it sense and meaning.

(c) In relation to 76(1)(a) Mr McGuire submitted, firstly that that provision likewise did not extend to include the way in which an application for Reconsideration under Rule 70 had been conducted.

18. In the alternative, let it be assumed that the Tribunal considered that the phrase "proceedings (or part)" fell to be construed as including the making and conducting of an application for Reconsideration, Mr McGuire submitted that no aspect of the respondents' making or conducting of proceedings in relation to the application for Reconsideration could be regarded as constituting unreasonable conduct either on the part of the respondent or of its legal representatives.

(a) Under reference to ***Newcastle Upon Tyne City Council v Marsden*** UKEAT/393/09, he reminded the Tribunal that the Employment Tribunals were established and remained primarily, as jurisdictions where there was no rule to the effect that expenses were recoverable on and or followed success. While Parliament had legislated for certain exceptions to that generality, the making of such orders remained the exception and not the rule.

(b) Under reference to Rule 72 Mr McGuire submitted that upon its initial consideration of the application for Reconsideration, the Tribunal not having refused the application on the grounds that there was no reasonable prospect of the original decision being varied or revoked and those words to be taken as having the same meaning when used in Rule 72 as when used in Rule 76(1)(a), it was not open to the claimant to now argue that the application for Reconsideration had enjoyed no reasonable prospect at the point of its having been first made, nor that in insisting upon it at a hearing fixed by the Tribunal, the respondent had conducted proceedings unreasonably in the context of a Rule 76 expenses application.

Discussion and Disposal

19. In this case the specified ground upon which the making of a cost order is sought is that of the respondent having acted unreasonably in the conduct of proceedings by making and insisting upon at hearing an application for Reconsideration of the Tribunal's judgment; The same by reason of that application being one which enjoyed no reasonable prospect of success.

The Applicable Law

20. The application is advanced in reliance upon Rules of Procedure 75(1)(a) and 76(1)(a) and or 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (Schedule 1). Rules 75(1) and 76(1) are in the following terms:-

> "***Costs orders and preparation time orders***
>
> *75.—(1) A costs order is an order that a party ("the paying party") make a payment to—*
>
> *(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*
>
> *(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or*
>
> *(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.*
>
> *(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by*

any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success."

21. The expenses in respect of which an order is sought relate to an application for Reconsideration which, in its turn, proceeded in terms of Rules of Procedure 70, 71 and 72. Rules 70, 71 and 72 are in the following terms:-

"***Principles***

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be,

the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

22. In the course of their submissions parties representatives made reference to the following authorities all of which the Tribunal found instructive:-

For the claimant:-

Gee v Shell UK Limited [2002] EWCA Civ 1479

Barnsley Metropolitan Borough Council v Mrs Anna Yerrakalva [2011] EWCA Civ 1255, 2011

Mr A Haydar v Pennine Acute NH Trust Appeal Number UKEAT/0141/17/BA;

And for the respondent:-

Newcastle City Council v Marsden (UKEAT/393/09)

Summary of Arguments, Discussion and Disposal

23. The order sought is one to be made in terms of Rule 75(1)(a); that is a party party order in respect of expenses that the receiving party has incurred while legally represented or while represented by a lay person. In terms of the application the Tribunal's discretion to make the order is said to be awakened in terms of Rule 76(1)(a) and or 76(1)(b).

24. The application was opposed upon, amongst others, the grounds of competency.

25. It was submitted on behalf of the respondent, under reference to the definition of "claim" and of "response" which appear in paragraph 1 (the interpretation) of Schedule 1 of the 2013 Regulations, that the terms of Rule 76(1)(b) were clear and

unambiguous. They referred to any claim or response which the Tribunal considered had no "reasonable prospect of success" and did not refer to and therefore were not habile for the purposes of awakening the Tribunal's discretion in the case of an application for reconsideration.

26. In relation to Rule 76(1)(a) it was submitted, for the respondent, that the phrase "or the way that the proceedings (or part) have been conducted", which appears in 76(1)(a) fell to be interpreted as not including the making by a party of, or the persisting by a party in, an application for reconsideration of a judgment in terms of Rule 70. Thus it was submitted that an application for an expenses order, insofar as it related to the making or conduct of an application for Rule 70 Reconsideration, could not be competently made in terms of Rule 76(1)(a) or 76(1)(b) and that the application should be refused for want of competency.

27. I found the claimant's representative's argument in support of reliance upon Rule 76(1)(b) to be convoluted and unattractive, particularly since the definition of complaint which is relied upon for the purposes of making the link is one which relates to the use of that term in "any enactment conferring jurisdiction upon the Tribunal".

28. I do not consider it necessary to seek to put such a strained construction on the wording of Rule 76(1)(b) standing the terms of Rule 76(1)(a), I am satisfied, in the absence of any restricting statutory definition to the contrary and according to the words their normal English language meaning, that the term "*or the way that the proceedings (or part)*" have been conducted, extends to cover the making and insisting upon of an application, for reconsideration of a judgment of the Tribunal, in terms of Rule 70.

29. There is an onus on the party seeking expenses (in the instant case the claimant) to establish that the Tribunal has jurisdiction to make an award or, in other words, that Rule 76 is engaged thus awakening the Tribunal's discretion.

30. The discharge of the burden involves two elements;

(a) Firstly that the Tribunal be satisfied that the particular aspect of the conduct of proceedings, which it is sought to characterise as unreasonable, can be seen to competently fall within the ambit of Rule 76. In relation to that first aspect I am satisfied that the claimant's application can be competently founded in terms of Rule 76(1)(a) and I reject the submission that the Application is incompetent, insofar as founded upon Rule 76(1)(a).

(b) Secondly, that of whether the respondent has acted, in the instant case unreasonably, in the particular aspect of the conduct of proceedings which is criticised. In the instant case the bringing and the insisting upon an application for Reconsideration of the Tribunal's judgment of 17 July 2018, which falls to be regarded as an Application which had enjoyed no reasonable prospect of success.

31. Thereafter, let it be assumed that that onus is discharged, a third element consists of the Tribunal being satisfied as to whether a right and proper exercise of its awakened discretion should lead to an award of expenses, based upon all relevant factors (see ***Haydar v Pennine Acute NHS Trust*** UKEAT/0141/17).

32. In the case of the instant application, the specific ground upon which the claimant offers to establish unreasonable conduct of proceedings is that of the application for Reconsideration having no reasonable prospect of success.

Competency

33. As already set out above I am satisfied that an application for an Expenses Order, made on that basis, can competently be brought in terms of Rule 76(1)(a) viz; "acting unreasonably" in either the bringing of proceedings or part, or in the way that proceedings or part have been conducted, including the bringing and or insistence upon an application for reconsideration which had no reasonable prospect of success.

34. Accordingly, I am satisfied that there is before me a competent application for the making of an expenses order, certainly in terms of Rule 76(1)(a), which requires to be considered and determined.

General Considerations

The Two Stage Test

35. Rule 76(1) imposes a two stage test:

    (a) First a Tribunal must ask itself whether a party's conduct falls within Rule 76(1)(a) (on the grounds advanced in the instant case whether the respondents' application for Reconsideration enjoyed no reasonable prospect of success) such that their making of it and insisting upon it at hearing constituted their acting unreasonably in the conduct of proceedings.

    (b) If so the Tribunal must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against the party, taking into account the circumstances of the case and any relevant factors; that is to say the trigger of unreasonable conduct, if it is satisfied, is a necessary but not sufficient condition of itself for the award of expenses.

36. The Tribunal's discretion, once awakened is broad and unfettered and subject to the normal requirement that it be exercised judicially.

37. Reasonableness is a matter of fact for the Employment Tribunal and whether conduct falls to be characterised as unreasonable requires an exercise of judgment in the circumstances of each case and about which there can be scope for disagreement as between Tribunals while properly directing themselves in law.

38. Employment Tribunals should be careful not to penalise parties unnecessarily by labelling conduct as unreasonable when it may in fact be legitimate in the particular circumstances.

The Instant Case

39. In the instant case the unreasonableness of the conduct is said to arise by virtue of the application for Reconsideration having no reasonable prospect of success.

40. The phrase, "***no reasonable prospect of the original decision being varied or revoked***" appears in Rule 72(1) relating to initial consideration of an application for Reconsideration, and the phrase; "*no reasonable prospect of success*" where it appears in Rule 76(1)(b); and falls to be implied in the context of considering the reasonableness of conduct in Rule 76(1)(a), in the absence of any express differentiation of meaning contained within the Rule; consider that these phrases fall to be accorded the same meaning, and again the same meaning as when used in Rule 37(1)(a) which deals with the grounds upon which a claim may be struck out.

41. It is a matter of settled law that the term "acting unreasonably in the conduct of proceedings" can include but is not restricted to, "bringing and or insisting upon an application which had no reasonable prospect of success."

42. In considering the first issue for determination, namely whether, in retrospect, the respondent's application for Reconsideration falls to be regarded as having had no reasonable prospect of success, I note the following:-

    (a) The fact that a claimant or respondent may ultimately be successful does not necessarily prevent the Tribunal from making an expenses order against him or her based upon unreasonable conduct.

    (b) Equally, the fact that a claimant or respondent may ultimately be unsuccessful, in whole or in part, of proceedings (in this case an

application for Reconsideration), does not of itself establish that the application in question enjoyed no reasonable prospect of success.

43. Whether the application for Reconsideration fell to be regarded as having no reasonable prospect first fell to be considered, in terms of Rule 72(1) at the point of its initial consideration by an Employment Judge who, if so concluding, is required in terms of that Rule to refuse the application forthwith and direct that parties be informed of the same.

44. When determining such a question the Tribunal must consider whether, on careful consideration of all of the available material, it can properly conclude that the claim (or in this case application) has no reasonable prospect of success at any point in time. "The test is not whether the claim is likely to fail, nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3, (- or in this case the claimant's written grounds of opposition,) or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. (It is a high test)"; per Lady Smith in ***Balls v Downham Market High School and College*** 2011 IRLR 2017, EAT.

45. In the instant case, applying that test on initial consideration of the Application for Reconsideration, I did not refuse the Application forthwith. I considered that the application should most appropriately be considered and determined at a hearing, parties being advised of the outcome of that initial consideration on 30 August 2018. The response to the application for Reconsideration, intimated by the claimant on 16 September 2018 substantially reflected the submissions subsequently made by them at hearing. Following hearing and for the reasons fully set out in my written determination of 25 March 19, with which parties are fully conversant, I refused the application for Reconsideration on the grounds upon which it was advanced, declining to vary or revoke any aspect of the Tribunal's judgment. In so doing I sustained the third ground upon which the claimant opposed the application for Reconsideration namely that it could not be said on the

material available and the submissions made that it was *"necessary in the interests of justice"* [Rule 70] that reconsideration be allowed.

46. The fourth ground upon which the claimant opposed the application for Reconsideration, and as is recorded by me at paragraph 9(4) at page 9 of the Note of Reasons attached to my determination of 25 March 2019 ("The Note of Reasons") was:-

> "4. That the reconsideration application is misconceived, unmeritorious and thus being capable of being described as frivolous, the bringing of and insisting upon it represents unreasonable conduct, and consideration should be given to making an expenses award against the respondent in respect of costs incurred by the claimant in responding to it."

47. As further noted by me at paragraph 10 of the Note of Reasons while the claimant's representative did not make an application for expenses in the course of the hearing, he reserved his position in that regard.

48. In refusing the application for Reconsideration after hearing I did not do so by reason of sustaining the claimant's fourth ground of opposition.

49. In support of the proposition advanced at today's hearing namely that the bringing of and insisting upon the application for Reconsideration represents unreasonable conduct because the application enjoyed no reasonable prospect of success, the claimant's representative variously submits and invites me to hold that:-

    (a) "The respondent ought to have known that the Employment Tribunal would not be predisposed to changing its view on matters based upon the rehearsing of the same arguments unless there was either a change of circumstance or a readily identifiable error."

(b) That the Tribunal was likely to determine that it was not appropriate for it to engage in discussions about whether it had made an error of law,

(c) that the respondent in contending that the Tribunal had erred in law, on the grounds upon which they asserted it had, would have known that the Tribunal had already heard their argument (at the hearing at first instance) and had not accepted it and should have considered that the same decision maker would be highly unlikely to come to a different view in those circumstances.

(d) That it was, or should have been, obvious to the respondent that the application was unlikely to succeed based upon the knowledge which the respondent had or can be taken to have had.

50. On the above basis it is submitted that the respondent should have known (and I am invited to hold) that both as at the date at which it brought it and separately and in any event as at the date of its hearing, that the application for Reconsideration had no reasonable prospect of success and for that reason that the respondents in making and insisting upon the application had acted unreasonably in the conduct of proceedings.

51. In respect of grounds 1 and 2 upon which the application for reconsideration was advanced, it is indeed the case that I determined that the threshold test of "it being necessary in the interests of justice to do so" had not been met. My so determining does not however establish that the application was one which had no reasonable prospect of success. As noted, at paragraph 41 above and per ***Balls v Downham Market High School and College***, the test to be applied is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3, or in this case, by the claimant in its written grounds of opposition to the Application for Reconsideration.

52. In respect of the third ground of application for reconsideration I rejected the contention that I had erred in law in determining that my discretion to make an uplift in terms of section 207A of the 1992 Act had been awakened nor in exercising my discretion such as to fix the uplift at 15% in the particular circumstances of an unreasonable failure to comply with the Code of Practice. I separately observed that were I wrong in that regard the correcting of any such error in law was properly a matter that fell to the Employment Appeal Tribunal.

53. The first ground of application advanced was one that alleged a failure to consider, or in the alternative to fully explain the reasoning for not taking into account, the admitted fact that when the claimant went off sick on 24 July 2017 she did so, at least in part, to avoid the consequence of a second complaint raised against her by a colleague. It was accordingly contended that there had been a failure to fully consider the evidence before the Tribunal at hearing in this regard; or, in the alternative, a failure to fully explain the reasons why the Tribunal had found as it did in relation to the reasons for dismissal in the light of that evidence. Thus, it was argued that it was necessary in the interests of justice to reconsider that evidence and the particular decision as to constructive dismissal in the light of it.

54. While, upon an analysis of the Findings in Fact made and the Note of Reasoning attached to the Tribunal's judgment and in the light of having heard parties, I rejected both of those contentions, I do not consider that it could be said, in advance of that hearing, consideration and determination, that there could be no reasonable prospect of persuading me otherwise, at least in part.

55. Separately, insofar as the ground advanced was one said to be based upon a failure to adequately explain the reasons for the decision to the extent that that amounted, in the circumstances, to an error in law, it is the case that Tribunals at first instance have a duty to give adequate reasons for the decisions which they take and that a failure to do so can amount to an error in law.

56. While it is the case that I observed in the Note of Reasons attached to the Reconsideration Determination that I consider the correction of errors of law to be

properly the preserve of the Employment Appeal Tribunal, I equally acknowledge that the Rule 70 Power of Reconsideration is sufficiently wide to encompass the correction by a tribunal of an error in law, let it be assumed that it is persuaded that it has made one. In those circumstances I do not consider that an application for Reconsideration which is advanced, in part, upon an assertion that the Tribunal at first instance erred in law and inviting it to correct that error can be said, for that reason alone, to enjoy no reasonable prospect of success.

57. The third ground upon which Reconsideration was sought was that related to the making by me of a section 207A TULR(C)A 1992 increase of 15% in the award made by me. I was invited at the original hearing not to make such an award and was invited to decline to do so on the basis that I should not construe the respondent's actings, in the particular circumstances of the case, such as to conclude that they had failed to hold a meeting in respect of the claimant's grievance "as soon as practicable". For the reasons set out by me in the note attached to the judgment, I rejected that submission and did construe the respondent's actings as amounting to a failure on their part to hold a meeting in respect of the claimant's grievance "as soon as practicable". Thereafter, holding that my discretion to do so had been awakened, I went on to consider making and to make an order applying a percentage increase in the award made. The ground advanced under this head in the Reconsideration application was not a "rehash" of that argument but rather was a different argument namely that I had erred in law by conflating in my consideration and reasoning the disciplinary process with the grievance process to produce a conclusion that amounted to an error in law. For the reasons set out in the note attached to the Reconsideration Determination, I considered that argument to be unfounded in fact and thus rejected it. In the absence of any explanation as to why the argument that construing the respondent's actings as amounting to a failure to comply with a Code of Conduct could result only from a legally erroneous conflation of the grievance procedure with a disciplinary procedure could not have been advanced at the original hearing, I separately observed that I considered attempting to do so upon a Reconsideration amounted to taking "a second bite at the cherry".

58. Although, let it be assumed that such an argument had been founded in fact I would have been reluctant to listen to it as a ground necessitating a Reconsideration in the interests of justice in the absence of an explanation as to why it could not properly have been advanced at the original hearing, I do not consider that it could be said that there was no reasonable prospect of such an argument being listened to.

59. In relation to the second ground of application for Reconsideration, I considered that there was merit in the argument advanced by the claimant's representative at today's hearing. The second ground was to the effect that had the claimant raised her complaint of constructive unfair dismissal (through her chosen vehicle of amending it into her original complaint sooner, within the three month statutory period during which she was entitled to raise the claim, than she in fact had done that the claim would have come to a three day hearing on its merits on dates significantly earlier than the 2nd to 4th July and that that in turn would and should have resulted in a significantly lower compensatory award.

60. As is rehearsed in the Note of Reasons attached to the Reconsideration Determination, I considered that argument to be one which was advanced on an entirely speculative basis that is to say without any evidential basis for it having been presented at the Reconsideration hearing and separately, upon a misconstruction of the terms of section 123 of the Employment Rights Act 1996. While, let it be assumed that an earlier hearing on the merits had taken place, something for which there was no evidential basis for concluding, that would have shifted the balance as between past loss and future loss, it would not, on the normal and well understood construction of the terms of section 123 of the 1996 Act resulted in a reduction in the overall compensatory award. Separately, the same argument as was advanced in this regard within the Reconsideration application was argued before me at final hearing on the merits, was considered by me at the time of my forming my judgment and was rejected. In circumstances in which the respondents must have known that they did not intend to advance any different argument or seek to adduce any additional evidence at the

Reconsideration hearing, that this ground is one which I am persuaded falls, in retrospect, to be regarded as enjoying no reasonable prospect of success.

61. That second ground, however, was one of three grounds upon which a Reconsideration was sought.

62. The requirement that an Employment Judge on initial consideration of such an application "*shall refuse the application*" set out in Rule 72(1), is a requirement which arises only where, upon such initial consideration, the Judge considers that there is no reasonable prospect of the original decision being varied or revoked. Revocation envisages complete success on Reconsideration; Variation encompasses partial success even if restricted to one ground of application only. In that context I do not consider that an application for Reconsideration falls to be considered as one enjoying no reasonable prospect of success, for the purposes of a section 76(1)(a) application, where one only of the grounds upon which Reconsideration is sought can be said to be so categorised.

Disposal of the Application for the making of an expenses order

63. For the reasons set out above I do not consider that the application for Reconsideration, advanced by and insisted upon to hearing by the respondent, falls to be regarded as an application which enjoyed no reasonable prospect of success, the same being the ground upon which the application for expenses was advanced. On that basis of fact I do not consider that in so bringing and insisting upon the application for Reconsideration the respondents have acted unreasonably in the conduct of proceedings for the purposes of section 76(1)(a). In those circumstances I do not consider that my discretion to make an award of expenses has been awakened in terms of section 76(1)(a) and on that basis I refuse the application for an expenses order.

64. I separately conclude, let it be assumed that I had considered my discretion awakened, that I would have been disinclined to make an award in the particular circumstances pertaining. The same because the application for Reconsideration

would have proceeded on the first and third grounds, in any event, and the expenses of opposing the application, both on paper and at oral hearing, said to have been incurred by the claimant and in respect of which the award is sought, would have been substantially incurred in any event.

65. Finally, lest it be of assistance in relation to the quantification of such awards where made, and subject to the exhibiting of vouching of the fact that the claimant had in fact incurred the expenses in question and to any specific challenges advanced, including on the issue of whether or not Value Added Tax properly fell to be added to the account, I would have considered, in the first instance an account which had prepared in accordance with the Act of Sederunt Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993 to have been quantified in a reasonable amount.

Date of Judgement: 30th July 2019
Employment Judge: Joseph d'Inverno
Entered in Register: 30th July 2019
And Copied to Parties