EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr R Owen	and	R1 – Amec Foster Wheeler Energy Limited R2 – Mr Jim Shaughnessy

DECISION ON APPLICATION FOR RECUSAL AND RECONSIDERATION

Under Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. The Claimant's application dated 20 May 2019 for Employment Judge Vowles to recuse himself from reconsideration of the Judgment dated 27 January 2017 is refused.

2. There is no reasonable prospect of the Judgment dated 27 January 2017 being varied or revoked on the grounds set out in the second application for reconsideration dated 8 June 2018. The application is refused.

3. Reasons for this decision are attached.

REASONS

Background

1. At a Tribunal hearing held on 12–16 December 2016 (Employment Judge Vowles with members Ms Breslin and Ms Edwards), the Claimant's claims of direct disability discrimination, indirect disability discrimination and failure to make reasonable adjustments were determined. All claims failed. The Majority Reserved Judgment with Reasons was sent to the parties on 27 January 2017.

2. On 8 February 2017 the Claimant made an application for reconsideration of the Judgment. The application was refused on 30 March 2017.

3. On 8 June 2018 the Claimant made a second application for reconsideration of the Judgment. On 20 May 2019 the Claimant made an application for Employment Judge Vowles to recuse himself from dealing with the second application for reconsideration.

Decision on Application for Recusal

4. The application dated 20 May 2019 had 4 grounds.

   4.1. The Claimant has made an allegation that the Respondent had produced forged evidence and Employment Judge Vowles may be called as a witness in possible criminal proceedings.

   4.2. Tribunal correspondence dated 10 August 2019 stated that the issue to be considered in the application for reconsideration was examined at the original Tribunal hearing and as part of the first application for reconsideration, and this may lead to a potential charge of apparent bias.

   4.3. In the original judgment Employment Judge Vowles made a comment as to the clarity of the evidence of Nigel Yates and he is one of the main actors involved in the origin of the disputed document, and this may lead to a potential charge of apparent bias.

   4.4. In the original judgment Employment Judge Vowles described aspects of the Claimant's version of events as implausible, and this may lead to a potential charge of apparent bias.

5. There is no realistic prospect of me being called as a witness in criminal proceedings.

6. The Claimant is correct that the issue regarding the pre-assignment medical procedure was examined at the original Tribunal hearing and as part of the first application for reconsideration, and that the Judgment did refer to the clarity of Mr Yates' evidence, and the implausibility of part of the Claimant's case.

7. None of these matters, however, are sufficient to establish apparent bias, or to provide grounds for recusal. In the leading case of Porter v Magill [2002] 2 AC 357 HL it was said that to establish whether there was apparent bias in any case, the court or tribunal must consider whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. That test is not made out here.

8. Additionally, Rule 72(3) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 requires, where practicable, a preliminary consideration under Rule 72(1) of an application for reconsideration

to be conducted by the Employment Judge who made the original decision or chaired the full tribunal which made it. There are no grounds in this case for any departure from the provisions of that rule.

9. I do not consider that the Claimant has raised any proper grounds for me to recuse myself from conducting a preliminary consideration of the second application for reconsideration.

10. The application for recusal is refused.

Decision on Second Application for Reconsideration

11. Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 -

Rule 70 Principles

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.

Rule 71 Application

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.

Rule 72 Process

(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 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. …

12. In Trimble v Supertravel Ltd [1982] ICR 440, the Employment Appeal Tribunal said that on an application for review (now reconsideration), if a matter has been ventilated and properly argued during the course of Tribunal proceedings, then any error of law falls to be corrected on appeal and not by way of review.

13. In Newcastle-upon-Tyne City Council v Marsden [2010] ICR 743, the Employment Appeal Tribunal said that dealing with a case justly in accordance with the overriding objective in regulation 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (now rule 2 of schedule 1 to the 2013 regulations) required the application of recognised principles, in particular the importance of finality in litigation, since justice required an equal regard to be paid to the interests and legitimate expectations of both parties and that a successful party should in general be entitled to regard a Tribunal's decision on a substantive issue as final, unless there are exceptional circumstances.

14. The second application for reconsideration dated 8 June 2018 also contained an application for an extension of time for reconsideration, and an application for stay of the application pending appeal to the Court of Appeal from a decision made by the Employment Appeal Tribunal on 1 June 2018.

15. The application for stay was granted on 21 September 2018.

16. The Court of Appeal dismissed the Claimant's appeal on 14 May 2019.

17. On 16 May 2019 the Claimant requested that his application for reconsideration dated 8 June 2018 should proceed.

18. On 20 May 2019 the Respondent repeated its original objection to the application dated 15 June 2018 and 4 July 2018.

19. I have considered the contents of all the above documents and I am satisfied, now that the Court of Appeal proceedings have concluded, that it would be in the interests of justice to consider the application for reconsideration. Although it is presented after the expiry of the time limit in rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, because it is said to be based upon new evidence which has now come to light it is appropriate to extend time under rule 5 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

20. The second application for reconsideration dated 8 June 2018 included the following:

    Application for a Reconsideration of Case Number: 3322658/2016

The Claimant applies under Rule 71 of the Employment Tribunals Rules of Procedure 2013 ("ET Rules") for a reconsideration of the judgment made by Employment Judge Vowles on 23 January 2017 ("the Judgment"), specifically paragraph 16 of the Judgement stating that "the original Foster Wheeler procedure was replaced by the new procedure which came into force in February 2015 and applied to all employees who were due to be deployed on assignments overseas". This led to the Claimant's claims of direct disability discrimination (section 13 Equality Act 2010), indirect disability discrimination (section 19 Equality Act 2010) and failure to make reasonable adjustments failed (section 20 Equality Act 2010).

The Claimant believes that it is necessary for the judgment to be varied or revoked because new evidence has now come to light to challenge the tribunal's decision and have the Judgment varied or revoked. This evidence is in addition to the documented evidence presented at the Tribunal by the Claimant and recorded in the Bundle. This new evidence is metadata of the AMEC Global Assignment Policy – Document Number: GM.PAP-PR001 confirming that the document was created on 26 August 2015, contrary to paragraph 16 of the Judgment stating the document came into force on February 2015. We further have email evidence from the original author of the document clarifying the scope, provenance and applicability of the document. The metadata also evidences that the document was edited and revised by a non-authorised person. Therefore, it is clear that the Respondents presented misleading and potentially dishonest oral and documentary form evidence to Tribunal.

It is clear the Respondents have misled the Tribunal of the creation date of this document and/or falsified the creation date of the document with the intent to mislead the tribunal – the evidence available plainly shows a creation date of August 2015 and therefore the Tribunal erred in their Judgment that this document applied to our client, therefore reinstating claims for direct discrimination and/or indirect discrimination and/or failure to make reasonable adjustments. We have reason to believe that the various documents/policies including but not limited to AMEC Global Assignment Policy – Document Number: GM.PAP.GAP-PR001, created by AMEC Foster Wheeler Energy Limited was in fact available in January 2015 but was solely applicable to the pre-merger Amec employees and only until the new harmonised merged company Global Assignment Policy became available.

21. The Respondent's response to the application dated 15 June 2018, 4 July 2018, 20 May 2019 included the following:

The Claimant's application is misguided and a complete misrepresentation of the Judgment and the evidence before the Tribunal and we can only assume that you have not been fully informed of the facts by your client.

It was not the Respondent's case that the new Amec Foster Wheeler Global Mobility policy came into force in February 2015. The Judgment makes it clear at paragraph 15 that the Foster Wheeler policy remained in force but that a new procedure (not policy) in respect of pre-assignment medicals was adopted because the legacy Foster Wheeler occupational health department had shut down internally and there was a new third party occupational health provider engaged by the Respondent, Healix.

This procedure regarding the engagement of Healix is what is quoted at paragraph 16 of the Judgment (quoting from page 116 of the bundle) and referred to in the evidence and that was a power-point presentation that was given to employees in the Global Mobility department to explain the new process and engagement with Healix as new external providers of occupational health services. It was not the Respondent's case that any new policy came into force in February 2015 but the instructions to the Global Mobility team were that the new Healix process would apply to all prospective assignees. Neither does the Tribunal's Judgment say that the legacy Amex document came into force in February 2015; it clearly states that the new Healix procedure was adopted.

It was the Respondent's case that the new harmonised Amex Foster Wheeler policy did not come into force until March 2016 (which is apparently broadly consistent with the Claimant's recollection). …

However, the key issue is that the "date modified" is shown as 26th August 2015 which was before the international assignment for the Claimant was even envisaged. It is therefore fundamentally unclear what it is that the Respondent's staff are alleged to have done that is "fraudulent" and clarification on this point is asked for in the attached email. Even if what the Claimant is saying is correct and the policy was modified on 26th August 2015 (which it is not); this was prior to when the Claimant was put forward for international assignment and so it has no bearing on the case and is not probative that the Respondent has somehow altered the document to suit its case (which one assumes is what is alleged). …

The Court of Appeal Judgment (also attached) makes express reference to the dispute regarding the policy before the Tribunal and at paragraph 7 records the following, "The pre-merger Foster Wheeler global mobility assignment policy remained in force but their pre-assignment medical procedure was applied to the Claimant, but that is no longer an issue. The ET found that the Healix procedure applied to all employees who were due to be deployed on assignments overseas."

22. The Respondent is correct in stating that in paragraph 14 (not 15) of the Judgment Reasons the Tribunal found that in February 2015, following the merger of Foster Wheeler and Amec, the in-house occupational health department was closed and outsourced to an occupational health organisation

called Healix. The Foster Wheeler global mobility assignment policy remained in force but the pre-assignment medical procedure was superseded by a new procedure involving Healix.

23. I am not persuaded that the new evidence regarding metadata, even if it were to show that the policy, rather than the procedure, was modified on 26 August 2015 (and that remains unclear and in dispute) demonstrates any fraud or wrongdoing on the part of the Respondent or its advisors.

24. Further, I accept the submission of the Respondent that even if the date of 26 August 2015 is correct, that was before the Claimant was identified as one of the engineers proposed for the international assignment in Dubai. That occurred in September 2015. Accordingly, even if that information is accurate and was available to the Tribunal during the course of the hearing, it would have made no difference whatsoever to the outcome.

25. Additionally, as the Respondent has pointed out, the Court of Appeal Judgment has made reference to this issue at paragraph 7 of the Judgment (quoted above) and confirmed that it is no longer an issue.

Decision Summary

26. The interests of justice do not require reconsideration in this case. It would be contrary to the principle of finality in litigation and would not make any difference to the outcome of the case.

27. There is no reasonable prospect of the original decision being varied or revoked on the grounds set out in the application.

……
Employment Judge Vowles

18 September 2019

Sent to the parties on

25 September 2019

…….....

for the Tribunal Office