EMPLOYMENT TRIBUNALS

Claimant: Mr R Tomos

Respondent: Institute and Faculty of Actuaries

HELD AT: Liverpool **ON:** 24 January 2020 & 27 January 2020 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms F Crane
Mr R Cunningham

Appearances
Claimant: In person
Ms Del-Priore, counsel

JUDGMENT ON RECONSIDERATION APPLICATION

The judgment of the Tribunal is: there is no reasonable prospect of the Judgment promulgated on 10 July 2018 being varied or revoked. The claimant's application for a reconsideration hearing to set aside the judgment and reasons promulgated on 10 July 2018 is refused and dismissed.

REASONS

1. This is a preliminary consideration of the claimant's application for a reconsideration, the Tribunal having struck out his claims of direct and indirect race discrimination on jurisdictional grounds, the claim form having been received outside the statutory time limits. In the alternative, the Tribunal also found it would have dismissed the claims on their merits. It also dismissed the claim of victimisation that had been received within the statutory time limits on their merits, with the exception of detriments 1(i) to (iv) and (vi) set out in the list of issues lodged outside the statutory time limit and dismissed for want of jurisdiction. The detriments dismissed as

being out of time relevant to this application for a reconsideration included:

1.1 1(ii) "failing to provide an adequate response to a subject access request ("SAR") on 6 August 2012" as referenced in paragraphs 64, 193 and 197 in the promulgated judgment and reasons sent to the parties on 10 July 2018 ("the 2018 judgment and reasons").

1.2 1Karen Brocklesby on 6 August 2012 failing to inform C that R had 'no marks' or 'no data' in respect of that examination?

2. This matter has a long and convoluted history. The claimant has requested a reconsideration of the judgment promulgated on 10 July 2018 in a number of applications. It is not proportionate or in accordance with the overriding objective to deal with the eight applications line-by-line or in any great detail other than that set out below. There is confusion about exactly how the claimant puts his arguments, and it is notable in the 'Respondent's Response to the Claimant's Reconsideration Skeleton' the respondent understood the claimant was seeking a reconsideration of his indirect discrimination claims only. The claimant at the reconsideration hearing confirmed he was seeking revocation of the entire judgment, including the striking out of all claims for being lodged outside the statutory time limits.

3. At the reconsideration hearing the Tribunal has attempted to carry out the difficult exercise entailed in understanding the claimant's arguments and picking through them in order to consider whether it was in the interests of justice to vary its judgment in any way. The claimant, who was acting in person, found it difficult to clarify his position, and attempted to put the case eon liability forward, and at one point referred the Tribunal to an American actuarial society. The claimant repeatedly attempted to reargue the case that had previously been before the Tribunal at the final hearing, relying now on new evidence relating to Portuguese and Greek actuarial governing bodies and drawing upon original evidence put before the Tribunal at the liability hearing, which it does not intend to repeat the Tribunal having provided 56-pages of reasons for its judgment following a liability hearing which took place over a period of 5-days.

4. The Tribunal intends to concentrate on the claimant's main arguments distilled from his eight original applications, oral submissions and skeleton arguments in order to establish whether it is in the interests of justice to reconsider on the basis that new evidence has come to light. It will deal with the issues raised on an application by application basis, drawing on the claimant's lengthy oral submissions, two hearing bundles, party-to-party correspondence, the claimant's skeleton argument and the claimant's response the respondent's skeleton argument. The Tribunal also took into account the respondent's response to the claimant's skeletons and oral submissions made by Mrs Del-Piore, which it does not intend to repeat in their entirety.

Application 1

5. The claimant's first application sought to adduce new information from the Information Commissioner's Office received on 30 July 2018 to the effect that it "does appear likely IFoA has breached the DPA as it did not respond to your SAR within the statutory time frame." Specifics were given as to an alert message sent to the claimant by the respondent which need not concern the Tribunal.

6. The Tribunal rejected the reconsideration application on 15 August 2018. The claimant has attempted to re-introduce this issue in subsequent applications, his skeleton and oral submissions which took place over a period of just under 2-hours. The Tribunal took the view that the reconsideration under this head has already been dismissed, and it is not prepared to reconsider a decision dismissing an earlier reconsideration application.

7. In the alternative, the Tribunal would have found the position adopted by IFoA after the claimant's case had been heard at liability stage was not relevant. The Tribunal accepted at paragraph 14 of the 2018 judgment and reasons, Karen Brocklesby's evidence that this was the first SAR the respondent had received and she did not know what to do with it. The Tribunal looked behind the fact of the SAR delay to discover why it had occurred and whether it was causally linked to any possible acts of discrimination, finding it was not having accepted the respondent's evidence. The fact that the IFO may have thought differently is not relevant to the tests applied by the Tribunal in discrimination cases. The Information Commissioner's Office test is different to that undertaken by the Tribunal when looking at discrimination, when the burden of proof provisions can play a pivotal part in the analysis of evidence.

Application 2: 21 January 2018

8. The claimant's second application dated 21 January 2019 refers to "new, credible and significant evidence" that had "emerged" and the judgment in the interests of justice required a reconsideration. The claimant requested the Tribunal consider his response to the respondent's correspondence dated 25 February 2019 found at pages 5 and of the bundle, which it has done. In that application the claimant relied upon cases which the Tribunal did not find assisted his arguments:

Mr R Davida v Institute and Faculty of Actuaries Case 2201346/2019

8.1 The claimant made reference to the evidence given at Employment Tribunal liability hearing following discrimination claims brought by Roopesh Davda, a student actuary who gave oral evidence at the claimant's liability hearing held in the week commencing 14 May 2018.

8.2 The claimant did not produce a copy of the judgment and reasons in Roopesh Davda case; he did however include in his bundle for this reconsideration hearing, on page 56, one page of written reasons in

case number 2203743/2013/ 2204069/2013 2200446/2014 and 2202131/2014 giving the Tribunal the impression that the judgment and reasons related to Roopesh Davda's case when the claimant was Mr K Hirani, a name the Tribunal did not recognise.

8.3 The claimant attempted to argue that Roopesh Davda had succeeded in part of his claim, and was reluctant to concede Ms Del-Priore's indication that Roopesh Davda had not succeeded in his claim for indirect race discrimination, despite the claimant's reliance at this reconsideration hearing on documents produced by Roopesh Davda described by the claimant in his 21 January 2019 reconsideration application as "Key…showing how their qualifications and accredited University courses map with the AAE syllabus."

8.4 The Tribunal has obtained a copy of the reserved judgment in case number 2201346/2019 from the Gov.UK website, dated 10 December 2019, unsigned and there is no promulgation date. Roopesh Davda was claiming indirect race discrimination arising out of a 2019 curriculum and an exemption transition period, his comparator being South African nationals. The provision, criterion or practice ("PCP) relied upon by Roopesh Davda was different from the PCP relied upon by the claimant and reference was made to the mapping exercises being incomplete (paragraph 71) an argument not relied upon by the claimant at his liability hearing.

8.5 In the judgment of case number 2201346/2019 reference was made to case number 2207536/2017 heard before a different employment judge and panel promulgated 20 May 2019, which the Tribunal obtained from the Gov.UK website due to the confusion over claims brought by Mr Davida and the claimant's reliance on them at this reconsideration hearing.

<u>Mr R Davida v Institute and Faculty of Actuaries Case number 2207536/2017</u>

8.6 Roopesh Davda in case number 2207536/2017 was successful in respect of his direct and indirect claims of race discrimination in respect of the respondent limiting the opportunities it gave him to pass examinations to qualify as a Fellow of the respondent with only 2 years in which to pass the relevant outstanding exams, compared to the greater number of opportunities/exemptions given to Indian nationals. The claims and comparators were different to those brought by the claimant.

8.7 Roopesh Davda was unsuccessful in his indirect race discrimination claim, the PCP's relied on were completely different to PCP's relied upon by the claimant in his case. With reference to the reasons promulgated in paragraph 159 of case number 2207536/2017, Mutual Recognition Agreements ("MRA") are dealt with, and at paragraph 160 the Tribunal found, (as did this Tribunal in relation to Mr Tomos) that the claimant had not achieved a primary full actuarial qualification with

any actuarial body, although it would be open to him to pursue this, including with the Swiss association.

9. The claimant relied on Actuarial Association of Europe ("AAE") Core Syllabus for Actuarial Training in Europe dated October 2011, described as guidelines that underpin the MRA. His argument was that this evidence only came to his attention in 2019 at Roopesh Davda's liability hearing in London Central, and it was just and equitable to extend time by setting aside the Tribunal's judgment on time-limits and jurisdiction on the basis that the evidence was key and started time running again. The Tribunal did not agree with the claimant's analysis and did not accept it was a valid means of circumventing limitation issues that stopped his claims in their tracks.

10. The claimant produced new evidence found between pages 93 to 351 of the claimant's bundle, submitting he was "inhibited" from making claims in 2017 because the information was not available to him, and the respondent had not disclosed it, which the Tribunal considered and does not intend to repeat, concluding the claimant had not acted with reasonable diligence.

11. Ms Del-Priore submitted that the "syllabus audit" obtained and relied upon by Roopesh Davda in his claims "shows nothing of any comparative merit or difficulty about other actuarial associations' routes to their Fellowship qualifications. It is merely input data about IFoA syllabus sent to AAE as part of their mapping exercise." In her skeleton she submitted the syllabus audit document and other documents referred to by the claimant demonstrate Fellowship was complaint with the AAE syllabus requirements when Associateship is not. The Tribunal agreed, and it accepted that the exercise was conducted by the AAE whose unchallenged conclusion was that the syllabus was compliant.

12. The Tribunal has considered the new evidence produced by the claimant, and took the view that none of it would have changed its decision; the claimant is clutching at straws and the Tribunal is satisfied that the claimant, had he proactively sought the documentation from its source, which he did not, could have produced it or applied for specific discovery orders from the Tribunal of the mapping and/or mapping syllabus in the power and control of a third party being the AAE. It is notable that Roopesh Davda did manage to obtain the documents for his hearing; he was a witness for the claimant, and the Tribunal is satisfied the documents could have be sourced by the claimant, who has been and remains tenacious and thorough when it comes to this litigation.

Application 3: 5 March 2019

13. The claimant relies on "fresh evidence" he obtained from Liverpool University's website obtained on 5 March 2019 relating to module mapping where exemptions were granted for the respondent's first 8 of 15 exams required to become a Fellow, and the AAE mapping. The Tribunal cannot say whether Liverpool University offered the same exemptions when the

claimant was seeking to qualify, and if so, how this fact assisted his case bearing in mind the protected characteristic referenced by the claimant was being of British nationality and national origin. The claimant's reliance on Liverpool University's 2019 website reinforces the fact that he has difficulty understanding the legal position underpinning the discrimination claims and that has continued throughout this litigation, which is unfortunate for all concerned.

14. The Tribunal was referred to paragraph 22 in the 2018 judgment and reasons, the claimant submitting Clifford Friend's evidence was not credible and the Tribunal cannot rely on it. In oral submissions the claimant stated the discrimination he complained about in 2017 was "worse than what I understood" as he did not have the benefit of the new material at the time, and appeared to be arguing that the qualifications in the UK are not equivalent, contrary to the evidence put forward on behalf of the respondent at the liability hearing. The claimant conceded during oral submissions that if the qualifications are equivalent that would be fatal to his claim.

15. The Tribunal took the view that paragraph 22 of the 2018 judgment and reasons still stands with the new information before it. The claimant has been unable to adduce any satisfactory evidence to the effect that foreign qualifications were not of the same standard as the respondent's, which is the nub of his case. The new evidence, particularly the AAE minutes, reflects the respondent worked closely with the regulators and detailed discussions regularly took place concerning the courses offered in Europe focused on AAE requirements.

16. The claimant seeks to introduce into the litigation a number of amendments which he believes could be a basis of his argument for the time limit issue. In oral submissions the claimant clarified that he wanted to claim race discrimination in respect of additional exams he failed by adding then to existing claim, despite the exams in question taking place before proceedings were issued in 2009/2011. The claimant argued as his ET1 claim form was not as complete as it should have been and as he had not issued fresh proceedings when the information/documentation was brought to his attention, it was in the interests of justice for the Tribunal to take this into account and set aside the judgment, presumably in order that the claimant could then apply to amend and put forward his arguments on time limits. The Tribunal found the claimant's arguments had no merit, and did not come close to meeting the test set out by the Court of Appeal in Ladd v Marshall [1954] 3 All ER 745, CA.

Application 4: 11 March 2019

17. The claimant relies on correspondence between the FRC and respondent dated November 2017 to February 2018 regarding the claimant's allegation that the respondent failed to carry out its "Putting Things Right" complaint process, which the claimant argued raises credibility issues sufficient to merit setting aside the judgment, given the fact the ICO ordered the release of the documents in 2019 when the respondent failed

to release them earlier maintaining a position that it was not in breach of the Data Protection Act)"DPA").

18. The Tribunal took the view that given the claimant was aware he had made a complaint under the 'Putting Thigs Right' process(a detriment relied upon and set out in the agreed list of issues 1(vii)), he could have requested the disclosure of the documentation exchanged between the FRC and respondent, making an application for specific discovery in the Tribunal, and at that point the judge would have been in a much better position to determine whether the disclosure was relevant and should be disclosed in the interests of justice. The claimant did not make such an application, and under the test set out in Ladd v Marshall the Tribunal was satisfied the evidence could have been obtained with reasonable diligence for use at the original hearing. It was not satisfied that the evidence was relevant and took the view it would probably not have had an important influence on the hearing bearing in mind the requirement that in an act of alleged victimisation the Tribunal must find a claimant has been subjected to a detriment because he has done a protected act.

19. In his skeleton the claimant submitted that the respondent's witnesses had denied breaching the DPA at the liability hearing, and yet 7-months later admitted 7 breaches to the County Court. The claimant referred the Tribunal to the respondent's amended defence in County Court claim number E50Z78NQ in which a number of admissions were made, including failure to provide the claimant with information in relation to his SAR requests dated 28 June 2017 within 40-days. The claimant alleges the respondent "misapplied litigation privilege relevant to the victimisation complaints" and the credibility of the respondent's witnesses has been compromised and undermined sufficiently for the judgment to be revoked.

20. Ms Del-Priore submitted the claimant had set out the full picture (the Tribunal has only been provided with the amended defence). She confirmed the ICO disagreed with the position taken by the respondent with regards to legal privilege, the County Court had agreed, "for the most part" with the respondent, and it found the claimant had behaved unreasonably in his conduct of the proceedings and ordered him to pay costs. The Tribunal accepted Ms Del-Priore's clarification, which was not disputed by the claimant, and it clear there was a triable issue on litigation privilege, a far from straightforward legal concept that protects certain kinds of communications.

21. The claimant's argument is that now all these documents have emerged it validates his victimisation case in 2017 that he was "starved of information and documentation reasonably requested as a member" as pleaded at paragraph 1(x)(3) and (4) in the list of protected acts set out within the 2018 judgment and reasons. The Tribunal took the view that it was clear from those reasons having heard oral evidence from witnesses, including the claimant, it had accepted the evidence of Suzanne Lyons as set out in paragraph 208 of the 2018 judgment and reasons. There is a reference to the matter becoming complicated by the litigation, and in the claimant's application dated 11 March 2019 he also refers to the respondent and the

FRC relying on litigation privilege. The issue of litigation privilege was not before the Tribunal at liability stage; five full lever arch files of documents were before the Tribunal and it was for the claimant to make the relevant application if he felt communications between the respondent and FRC was relevant to his claims, and not wait for a determination by the ICO.

22. The Tribunal examined the emails relied upon by the claimant in this reconsideration application. It is notable the claimant was emailing the DPO on 22 May 2018, which forms part of a serious of emails, and it is clear he is aware of the correspondence between the IFoA/Suzie Lyons and the FRC "regarding myself and the complaints I made." This supports the Tribunal's view that the claimant held sufficient information to make an application for specific disclosure, the liability hearing was completed by 24 May 2018 in chambers. It is notable the claimant has not produced the full email trail; however, it is apparent from the wording that the claimant was seeking copy documents in the months leading to the liability hearing.

23. The Tribunal is of the view that had the first test in Ladd v Marshall been met by the claimant, which it was not as the claimant could have obtained the documents with reasonable diligence for use at the original hearing, the evidence would probably not have had an important influence on the hearing including the issue of credibility. The claimant also has a problem with causation in relation to the information and documentation he now seeks to introduce, in that the Tribunal had made findings of fact in relation to the claimant's SAR requests, the first the respondent had to deal with. It is not inconceivable that had the issue of litigation privilege been raised by the parties, this may well have established an explanation untainted by race discrimination for the delay in providing the claimant with the documents he sought, coupled with the respondent's inexperience with SAR's as found by the Tribunal. It was for the claimant to establish a prima facie case of victimisation, and following the liability hearing he failed to discharge the burden of proof in this regard. Information about the position adopted by the ICO was before the Tribunal at the time, the County Court judgment was not and it is clear from both parties' submissions that the County Court determined arguments on litigation privilege that were not originally brought before this Tribunal.

24. The Tribunal is not satisfied the claimant could have established the causal connection between an act of victimisation and the refusal to provide copies of communications relating to the "Putting Things Right" complaint process or any of the FRC documents, given on the claimant's account both the respondent and FRC regulatory body were relying on litigation privilege. Finally, the emails relied upon by the claimant are essentially concerned with process, and would have had no bearing on the Tribunal's decision-making process in any event.

Application 5: 25 March 2019

25. The claimant referred the Tribunal to a selective number of party-to-party emails concerning whether the respondent had an Equal Opportunities Policy that applied to members as opposed to employees, Clyde & Co, the

respondent's solicitors, sought from the claimant further information and cooperation in an email sent 25 March 2019 setting out the following: "We will only make progress if you cooperate. There is no known policy under the title "Equality and Diversity Policy" – yet you have been referring to it in support of your claims." The claimant alleges the respondent gave misleading and false information to the Tribunal, and the respondent has never provided a copy of the Policy to the claimant or published it on the website.

26. The respondent accepts its Diversity Policy does not apply to members; it is a staff policy. Ms Del-Priore provided the Tribunal with a link to the respondent's member diversity strategy and she confirmed "diversity is a Key Feature of the Actuaries Code guidance" a proposition not disputed by the claimant.

27. At no stage has the claimant, until now, raised the issue of the respondent failing to have a "Equality and Diversity Policy" relevant to him. This is not part of the claimant's claims, and he did not allege the respondent contravened their own policy, or failed to have one. The Tribunal does not accept the claimant's submission that lack of a "Equality and Diversity Policy" gives rise to credibility issues sufficient to set aside the entire judgment. Turning to the test set out in Ladd v Marshall the Tribunal found that the evidence could have been obtained with reasonable diligence for use at the original hearing, for example, the claimant could have asked the respondent for a copy of its Policy, the evidence was relevant but would probably not have had an important influence on the hearing.

Application 6: 5 May 2019

28. The claimant relies upon material he obtained from the AAE portal going back to 2016 where allegedly other associations have raised similar concerns to the claimant, for example, following a MRA review in 2016. The claimant also relies upon a "members only" section of the AAE website accessible only when he became a "fully qualified actuary." The claimant argues that as the respondent had not disclosed the documents he was unable to test the evidence and shift the burden of proof.

29. In short, the claimant alleged as follows:

    29.1 The 20 September 2018 minutes refer to the IFoA undertaking a rigorous review of the MRA as a result of the litigation, which is proof as far as the claimant is concerned, that rigorous mapping had not been carried out before thus undermining the evidence given on behalf of the respondent at the liability hearing.

    29.2 The respondent queried the level of qualification assigned by association for the AAE MRA, Greece and Slovenia falling to meet the syllabus and yet the countries remained full members of the AAE, and Turkey was admitted despite not having a communication exam.

30. The Tribunal's conclusion set out in its judgment and reasons, specifically

at paragraphs 22 onwards, reflect the evidence before it at the liability hearing, and it does not accept the fact the respondent intended to undertake a "rigorous Review" in late 2018 amounted to any indication that the AAE requirements for Spain and Romania fell short of the standard expected of the claimant and other trainee actuaries in the UK. The Tribunal heard no evidence at the liability hearing in respect of Portugal, Greece, America, India or South Africa, countries apparently relied upon by the claimant and the previous litigants in the cases cited above.

31. At paragraph 25 of the 2018 Judgment and Reason the Tribunal records that the claimant had, since issuing these proceedings, qualified as an actuary and Fellow of the respondent. Accordingly, it must follow he had access to the members only section of the AAE website for part of the duration of this litigation, and could have discovered the documents for himself. The Tribunal accepts Ms Del Priore's submission that the AAE documents were not necessarily in the power and control of the respondent as they were AAE minutes.

32. The claimant has produced many the documents included in the preliminary hearing bundle, and he has made lengthy oral submissions on why the Tribunal should conclude that they were incorrect in finding, for example, an actuary qualifying in Spain does not mean he or she was less qualified than the claimant or an actuary qualifying in the UK (paragraphs 22 & 23). The claimant referred the Tribunal to a number of documents, which it does intend to go through in detail. It notes that in minutes held on 22 March 2013 there are 17 attendees from European different countries, and approximately the same number of apologies. The meeting of the Education Committee held in Vienna was concerned about when and how to review the syllabus in 2014, and there is no suggestion there was an inadequate mapping system, although queries were raised about individual countries. There was change of syllabus and an inevitable review, the assessment is minuted over a number of pages and there are references to governments having a role in determining what is covered, as was the case for Finland. The document confirmed "the assessment process is intended to assess how the association meets the sore syllabus requirements, whatever process is used" and there was a discussion about how the assessment was collected from each association and compared. Had this produced at the liability hearing, contrary to the claimant's submissions, the Tribunal concluded it would have supported the Tribunal's initial findings; it was clear that countries took the mapping and syllabus seriously.

33. The claimant also referred to a document titled "Extract from AEE Education October 2014" showing that some countries, such as Greece was still being rated as "red" not complainant and a communication skills qualification was not undertaken in first degree or second degree. It is unclear from the snapshot of documents provided by the claimant, the extend of the review, the follow up reviews which appear to take place over a number of years and outcomes in respect of individual countries. There is no reference in any of the documents how an actuary seeking Fellowship with the respondent, is required to sit an aptitude test or one-

year adaptation period, and it appears that the claimant is presenting an incomplete picture, cherry picking between all the countries that are party to the MRA who were actively trying to collate standards that cross-borders, assessing and re-assessing countries that may not be meeting all the standards.

34. 32 European countries bar Greece were found to have been complaint from September 2014, and the schedule reveals Greece were required to provide further details in relation to specific items, and a response was given Economics not being "currently" included, which the claimant argued was proof in favour of his case. The claimant did not appear to appreciate that there appeared to be no issue with economics in relation to the remaining 31 countries, and he fails to understand that mapping is not a certain science and judgments will have to be taken, reflecting that some countries have a different rules and regulations. To practice in the UK the aptitude test or a one-year adaptation was necessary and yet there was no reference to this condition as far as the Tribunal could tell from its perusal of the substantial amount of documentation before it.

35. The claimant also provided information provided for 2019/2020 academic year in Master Programme in Actuarial Science in University of Lisbon. The Tribunal took the view the claimant was not in a position to quantify the effectiveness/mapping of a 2019/2020 master course from its advertising material on the website; had this been possible there would be no need for the European countries to meet up, as they did in Vienna, and spend what appeared to be a lengthy period of time discussing the position. From the minutes it appears that numerous frequent meetings throughout Europe have taken and continue to take place to discuss mapping of professional qualifications. It is notable whist the Master Programme in Actuarial Science in University of Lisbon is credited by the respondent, there is no suggestion a student would become a Fellow automatically by completing the degree and it is difficult to understand the relevance of this evidence to the claimant's claim going back in time years before 2019/2010.

Application 8: 8 August 2019

36. The claimant relies on "fresh evidence discovered" on the Portuguese website relating to Portugal and the Master's degree which only maps to 8 of the 15 exams required, a new claim brought by the claimant who did not rely on Portugal in his original complaint or raise it at the final hearing. The evidence provided by the claimant appears to be dated August 2019 and it would not have assisted the Tribunal in determine the position at the time the claimant had issued his proceedings.

37. Ms Del-Priore submitted that universities, who seek IFoA accreditation, must demonstrate direct mapping to the IFoA syllabus in order for exam exemptions to be awarded, and it does not mean that the remaining course content which is not mapped or exempted is considered by the IFoA to be "low quality or inappropriate" and the Tribunal took the view the claimant did not possesses the specialist knowledge necessary to

understand the mapping requirements and its effect on syllabus in universities which the claimant had no experience of, other than website searches which he could have carried out in preparation for the final hearing.

Application 7: 9 August 2019

38. The claimant seeks to rely on new evidence having "found" minutes and documents generated by the AAE "of which the respondent is an active member" suggesting the respondent has access to all the records which the claimant believed, it was obliged to disclose, even if they were AEE generated documents. This argument has bene touched upon previously, and the Tribunal reiterates the point that the claimant did not make any applications for third party disclosure or specific disclosure of documents held by the respondent on behalf of the third parties.

39. The claimant sites Romania and Germany, and in respect of the former the claimant argued there were 4 tracks to certification, and one of those tracks was to study the core technical studies offered by the respondent. The Tribunal found it difficult to follow the claimant's arguments, he relies on incomplete documents dated 2006 and the Tribunal comes back to the problem it had at the liability hearing, which is the claimant is not sufficiently experienced or knowledgeable in European training requirements, he did not attend any of the AAE Education Committee meetings, he relies on documents dated 2006 (as was the case in relation to Romania) when in 2014 the minutes reflect the Romanian representative going away to "check to identify any gaps and suggest how they could be covered." The position in relation to mapping is moving forward all the time in relation to all relevant European countries and that includes Germany.

40. Ms Del-Priore submitted the claimant refers to material which shows the AAE deliberations about how the AAE member associations mapped to the AAE syllabus at a point in time, and if an association had a different standard a mechanism was put in place to address it. The Tribunal, from its own industrial knowledge, accepted Ms Del-Priore's argument that the assessment of equivalence is not an exact science or tick box exercise, as can be seen from the AAE minutes recording the discussions about the AAE syllabus, the minimum standard is set for all to meet, and when a country does not meet the standards, such as Greece, a process takes place with all the AAE member associations taking part. It is clear from the documentation before the Tribunal differences can arise, there are revisions and assessments taking place on an ongoing basis and it is difficult to see how the claimant can succeed by cherry picking single countries against a backdrop of other member associations throughout Europe (and the world) meeting the minimum standards set and mapped against without any issue. The claimant referred to the Casualty Actuarial Society based in America, which is not party to the AAE MRA, and the Tribunal agreed with Ms Del-Priore that the relevance of this was difficult to follow.

41. In relation to Germany, the claimant argued there was incomplete coverage of the "affective communications" and referred the Tribunal to page 291, a document completed and signed off 8 November 2018 after the Tribunal hearing, there is evidence of a further discussion and the Tribunal is aware from the information before it the AAE syllabus was changing.

42. Taking into account the test in Ladd v Marshall the Tribunal concluded that the earlier evidence could have been obtained with reasonable diligence for use at the original hearing, and seeking a reconsideration is not an answer to the claimant trawling the internet for fresh information in 2019 when the information could have been relied upon and relevance explored at a full merits hearing had the claimant thought of it and acted diligently, which he did not. Based on how the claimant pleaded his case it is unlikely the evidence would have been found relevant in any event, and it would probably not have had an important influence on the hearing.

Application 8: 22 August 2019

43. The claimant relies on AAE minutes and documents from 2012 to 2015 published by the AAE, which he argues "sinks" the respondent's case.

44. The claimant submitted that the respondent should have disclosed the AAE documents to him during the litigation. However, the claimant made no application before the Tribunal prior to or at the liability hearing for specific disclosure, including third party disclosure given the fact that the documents in question were in the possession and control of the AAE and not the respondent. It is inconceivable the claimant did not know there existed some documents/minuted meetings held by the AAE that dealt with mapping between the countries. The claimant refers to himself as a litigant in person and the need to be put on an equal footing; the time for this was when the claimant was bringing his claim and had he made applications for specific disclosure, which he did not in relation to the matters now complained of. The claimant is an experienced litigant in person; he is a highly qualified professional with postgraduate qualifications, holding the highest accolade possible offered by the respondent, and it is not an answer for him to rely on his status as a litigant in person for a poorly pleaded and presented case, the fundamental limitation issue with time limits, and ineffective PCP's.

Application 8: 27 September 2019

45. The claimant alleges the Tribunal was misled by the respondent regarding the CA3 examination having no competence standard, when evidence was given to a different Tribunal that competence standards were "universally applied" in an attempt to defend itself against a direct disability discrimination complaint.

46. In relation to CA3 examination the Tribunal found in the 2018 judgment and reasons at paragraph 52, Dr Watkins had informed the claimant that the CA3 communication exam was more difficult to assess objectively

compared to assessing mathematic answers but "a great deal of effort went into making the assessment criteria as fair as possible."

47. The claimant maintains that in case number 2207536/2017 paragraph 4.24 on page 351 the reference by EJ Auerbach at page 56 point 4.24 to "having to pass CA2 and CA3 – competence standard" is evidence that the respondent admitted there was a competence standard to the CA3, and this brings into question witness credibility. The Tribunal did not agree. Point 4.24 on page 56 must be read in context with reference to the entire judgment and reasons omitted by the claimant. It follows a discussion at page 243 when EJ Auerbach set out the provisions requiring adjustment in the claimant's claim that the respondent had failed in its duty to make reasonable adjustments and many "are about the competence standard." At paragraph 64 the CA3 exam is described in detail, the low pass rate of 30% and there is no mention of the respondent asserting "every conceivable facet of CA3 are competence standards and applied universally" and no finding by the Tribunal to this effect. It appears the claimant is recording his understanding of the respondent's arguments, and other than referring the Tribunal to point 4.24 on page 56, there is no supporting evidence that the respondent 's witnesses did not tell the truth at his liability hearing and misled the Tribunal.

48. Taking into account the test set out in Ladd v Marshall the Tribunal found that the evidence could not have been obtained with reasonable diligence for use at the original hearing given case number 2207536/2017 was heard at liability stage in 2019. The evidence as understood by this Tribunal is not relevant and would probably not have had an important influence on the hearing. Clearly CA3 attracted some form of competency standard against which students could be assessed to determine whether they passed or not and this was dealt with by the Tribunal in the 2018 judgment and reasons.

Law

49. Under Rule 70 of the Employment Tribunal Rules of Procedure 2013 a judgement can be reconsidered where it is *necessary in the interests of justice* to do. Under Rule 72 if a judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.

50. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation and reconsiderations are a limited exception to the general rule that judgements should not be reopened and relitigated. It is not a method by which a disappointed party to proceedings can get a second bite of the cherry, and it is the Tribunal's view that this is precisely what the claimant is seeking to achieve.

51. In the well-known case of Stevenson v Golden Wonder Ltd [1977] *IRLR 474, EAT*, Lord McDonald said with reference to review provisions that they 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 adduced which was available before' and it was apparent during oral submissions, despite a clear indication being given to the claimant on a number of occasions, he wanted to take the reconsideration application as an opportunity to re-hearse and re-emphasise the evidence in the hope that the Tribunal would change its mind and find all claims in his favour

52. Where relevant fresh evidence comes to light after the hearing that was not available at the hearing is a potential ground on which it might be in the interests of justice to reconsider a judgment.

53. Ms Del-Prior referred the Tribunal to the well-known Court of Appeal decision in Ladd v Marshall [1954] 3 All ER 745, CA. The Court of Appeal established that, in order to justify the reception of fresh evidence, it is necessary to show:

• that the evidence could not have been obtained with reasonable diligence for use at the original hearing

• that the evidence is relevant and would probably have had an important influence on the hearing; and

• that the evidence is apparently credible.

Conclusion

54. The Tribunal's discretion must be exercised judicially, with regard not just to the interests of the party seeking the reconsideration, but also to the other party, the requirement for finality to the litigation and giving effect to the overriding objective to deal with cases 'fairly and justly' — rule 2. This includes: ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues; saving expense, and it should be guided by the common law principles of natural justice and fairness. The Tribunal has taken all of these matters into account before concluding there was no reasonable prospect of the original decision being varied or revoked under rule 72, and it was not in the interests of justice to reconsider the 2018 judgment.

55. It is the Tribunal's view that the claimant in his eight reconsideration applications is attempting to rehearse the issues in his case by introducing "new" evidence. The Tribunal has worked hard, both at the hearing and in chambers, at understanding the basis of his reconsideration application; it has not been an easy task as the claimant conflates and confuses the arguments, forgetting that the relevant qualification complained about was the respondent's practices in awarding a Fellowship to men and women of all races, nationalities and national origins, not just limited to Europe but around the world via a number of different routes, one of which was successfully undertaken by the claimant.

56. Given the Tribunal's judgment on time limits and jurisdiction in relation to the direct and indirect race discrimination complaints, the basis of the claimant's application is unclear on why it is in the interests of justice to reconsider the judgment other than it was unfavourable to him. The claimant's submissions to the effect that had he been in possession of the new information fresh claims would have been issued, and in the alternative, given the respondent's failure to comply with its disclosure obligation (which the Tribunal did not accept was the case) the Tribunal should use its discretion in the claimant's favour and accept the claims (including new claims going back years before proceedings were issued in 31 May 2017) on the basis that it is just and equitable and in the interests of justice. There was no reasonable prospect that the Tribunal would revoke its decision to strike out the claimant's claims on jurisdiction grounds on the basis of the arguments put forward by the claimant, which revealed his lack of objectivity coupled with an unrealistic expectation.

57. Reconsideration of a judgment may be necessary in the interests of justice if there is new evidence that was not available to the Tribunal at the time it made its judgment. Taking into account the test set out in Ladd v Marshall the Tribunal took the view that much of the new evidence now relied upon by the claimant could have been reasonably known of or foreseen prior to or at the final hearing and there exists no additional factors or mitigating circumstances that has the effect that the evidence in question could not have been obtained with reasonable diligence at an earlier stage. The claimant was more than capable of amassing the evidence, he just did not think to do so hence the failure to make any application to the Tribunal for specific discovery. A reconsideration cannot be used to make up for deficiencies in how a case was run.

58. The new evidence must be potentially relevant and would probably have had an important bearing on the outcome of the hearing, including the issue of credibility and it could not have been obtained with reasonable diligence for use at the tribunal hearing. The Tribunal took the view that the new evidence relied upon by the claimant would not have an important bearing on the outcome; it is unlikely the burden of proof would have been reversed as submitted by the claimant, and it had absolutely no bearing on jurisdictional time limits that resulted in the claims of direct and indirect race discrimination and some detriments relied upon in the victimisation claim, being struck out. The Tribunal also took the view that the outcome of other litigation in the Employment Tribunal and County Court referred to above, would have made no difference to the outcome and did not raise credibility issue sufficient to dislodge the Tribunal's initial findings.

59. Having applied the overriding objective in rule 2, which requires the Tribunal's discretion to be exercised in a fair and just way, the Tribunal finds there is no reasonable prospect of the original judgment being varied or revoked. The two PCP's relied upon by the claimant in respect of the indirect discrimination claim were confused, not applicable to the claimant, who was not a fully qualified actuary with another body with whom the respondent had entered a MRA, as submitted by Ms Dl-Priore, who

reminded the Tribunal that “significantly” it had found objective justification established.

60. Ms Del-Priore argued it was inappropriate to consider equivalence at qualification level under AAE MRA in the context of exam exemptions, evaluating qualification equivalence involves taking a holistic view of the entire qualification and there was no university course under which someone obtain an Associateship or Fellowship without additional IFoA requirements to fulfil. The Tribunal agreed on the evidence before it. For example, a qualified actuary seeking Fellowship under the AAE MRA is required to sit either an exam or work in a 12-month adaptation period and so the Tribunal found at liability stage.

61. The claimant was and remains a qualified actuary, Roopesh Davda was not and the AAE documentation was available for him to source, and yet he did not do so despite Roopesh Davda appearing as a witness in his case. The Tribunal, who has struggled to understand at times, the relevance of all the documents produced by the claimant in this reconsideration application, took the view that its relevance was not easily apparent given the volume and piecemeal nature of the information which could only be understood with the assistance of an AAE witness to avoid the Tribunal interpreting the documentation out of context given the complex nature of the case. The claimant submitted that the AAE refused to provide him with documentation and referred the Tribunal to a transcript of a telephone conversation he had taken when speaking with a representative from the AAE, to prove the point. It did not. The claimant has always been aware of the AAE involvement and could have made an application for relevant third-party disclosure, or at the very least raise it as an issue at the interlocutory case management hearings or in correspondence.

62. The Tribunal has read the judgment and reasons in the cases brought by Roopesh Davda, and whilst he succeeded in the disability discrimination and discrimination claims, case number 2201346/2019 was unsuccessful. Roopesh Davda claimed indirect race discrimination arising out of a 2019 curriculum and an exemption transition period, his comparator being South African nationals and the PCP was different from that relied upon by the claimant. In short, it was a different case with different evidence, and despite the claimant’s best endevours to persuade the Tribunal otherwise, there was no basis for the Tribunal concluding that the claimant would be able to show, using the new information, that it was easier for foreign actuaries to be awarded a fellowship qualification on the basis that foreign qualifications were easier to get.

63. In conclusion, there is no reasonable prospect of the original decision being varied or revoked and the claimant's application for a reconsideration is dismissed.

Employment Judge Shotter

28.1.2020

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JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 February 2020

FOR THE TRIBUNAL OFFICE