EMPLOYMENT TRIBUNALS

Claimant: Ms B Thompson

Respondent: Ringway Jacobs Ltd

JUDGMENT ON RECONSIDERATION AND APPLICATION FOR RECUSAL

1. The claimant's application to recuse Employment Judge Daniels in this case is not well founded. It is dismissed.

2. The application for reconsideration is not well founded and is dismissed.

REASONS

3. This is an application for recusal and reconsideration following the recent applications from the Claimant to the Tribunal in the above matter in letters dated 28 September 2020 of 8.45am: 28 September 2020 sent at 9am and a letter of complaint dated 3 October 2020 sent at 18.21pm and a further letter dated 6 October 2020.

4. **Facts and key timeline**

The facts are set out clearly in the reasons given for the judgement dated 17 September 2020. I rely upon those facts herein.

The recusal application

Relevant law

5 The fundamental test for recusal set out in **Porter v Magill [2002] 2 AC 357** at paragraph 103 is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias. However, it is important that justice must be seen to be done, and equally

important that judicial officers discharge their duty to sit and not accede too readily to suggestions of the appearance of bias. (**Re JRL ex parte CJL [1986] 161 CLR 342**, recited in **Locabail** at paragraph 22.). Judicial officers are under a duty to hear and determine the cases allocated to them.

6 Examples of the appearance of bias were set out in **Ansar v Lloyds TSB Bank plc [2006} EWCA civ 1642**:

> "Burton J on that issue considered the authorities relating to bias. He also considered the decisions of the Employment Appeal Tribunal, which could have been said to support Mr Ansar's argument, and he summarised the law with some care in his judgment… Burton J sets out that summary in paragraph 13 of his judgment as he puts it, slightly reordering the propositions, and they run from 1 to 11:
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> *"l. The test to be applied as stated by Lord Hope in **Porter v Magill 620021 2 AC 357,** at para 103 and recited by Pill LJ in **Lodwick v London Borough of Southwark** at para 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.*
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> *"2. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: **Locabail** at para 21.*
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> *"3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: **Re JRL ex parte CJL [l9861] 161 CLR 342** at 352, per Mason J, High Court of Australia recited in **Locabail** at para 22.*
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> *"4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: **Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in Locabail at para 24**.*
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> *"5. The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in **Lodwick**, at para 18.*
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> *"6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: **Locabail** at para 25.*
>
> *"7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in **Lodwick** above, at para 21, recited by Cox J in **Breeze Benton Solicitors (A Partnership) v Weddell UKEAT/0873/03 at para 41**.*

*"8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in **Bennett** at para 19.*

*"9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearings, of the dialogue which frequently takes place between the judge or Tribunal and a party or representative. No doubt should be cast on the right of the Tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in **Peter Simpler & CO Ltd v Cooke [l986**] IRLR 19 EAT at para 17.*

*"10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: **Locabail** at para 25.*

*"11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (**Locabail** at para 25) if:*

"a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or

"b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,

"c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,

"d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,

"e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."

7 In my conclusion no matter has been put forward by the Claimant which approaches the sort of material sufficient to require the Employment Judge to consider recusal on the grounds of the appearance of bias.

8 The claimant's recusal application in her letter of 28 September 2020 (845am)

9 I shall now deal in turn with each of the claimant's apparent grounds upon which she seeks recusal.

10 The claimant refers in her letter of 845am of 28 September 2020 that her case management agendas were not considered and she was not on an equal footing. She does not explain this any further. In fact, each agenda prepared by either side was carefully considered and dealt with as appropriate. The Employment Tribunal does not understand the point she is making but nothing in that part indicates any grounds for recusal.

11 The claimant then relies upon insufficient notice, but this is not the case. The respondent's made their application to strike out the claimant's claims from 5 March 2020 and this has been notified as an issue to be dealt with since then including in the express terms of the listing of the September PH.

12 The claimant next alleges that the September Preliminary Hearing was held in private. This is incorrect. The last hearing was an open hearing held by CVP in accordance with the Tribunal rules on access to the public and the media, albeit no requests were made to join the hearing by any other party. The previous preliminary hearings were held in private and properly so.

13 The claimant says the notice gave no indication that the respondent's strike out application was going to be considered. In fact, it was abundantly clear to the claimant from 5 March 2020 that the respondent was pursing strike out of her claims on various grounds. Ultimately, the Employment Tribunal declined to strike out her claims and/or to hear various strike out applications on both 19 March 2020 and 5 July 2020. Effectively, the Claimant was on each occasion given more time by the Tribunal to deal with issues said to amount to breach on her part. In fact, this indicates that the Tribunal was taking detailed and repeated steps to give the claimant the opportunity to address her breaches of the orders etc. Further, the notice from the Employment Tribunal of the Hearing on 17 September 2020 clearly referred, in express terms, to the issue of the strike out applications being heard at the Preliminary Hearing.

14 The claimant next says that she was asked to mute her microphone and switch off her video during the Hearing and implies this suggests some fairness. This was done because the respondents had already done so as expressly requested by the Tribunal as the Tribunal were having a short break and it is customary and indeed advisable to invite the parties to mute their microphones and videos during any break. Both parties were treated in an identical manner during the breaks and no bias whatsoever is identified.

15 The claimant next refers to a comment about the whistleblowing claim. The tribunal does not understand the point she is making about the whistleblowing claim. The claimant was given a lengthy and detailed opportunity to explain why these claims should not be struck out. The claims under s43 ERA 1996 were struck out at the Hearing for cogent and clear reasons and nothing is provided in the application to cast any doubt on this decision (or any possible bias whatsoever). It is also noted that the claimant had been given very extensive opportunities to redress her breaches of orders and lack of pursuit of the claim, before the Tribunal took the decision to do so.

16 Moreover, an unusual aspect of this application is that the Claimant appears to rely in part on the fact that Employment Tribunal decided to strike out the Claimant's application in respect of relief under section 43 and s 103A ERA 1996. This is unusual as it was not mentioned by the Claimant at the 17 September 2020 hearing that she had in fact written to the tribunal on 19 July 2020 intending to withdraw her claim of automatically unfair dismissal by reason of public interest disclosure and she subsequently sent the application on 19 September 2020 at 3.28, apparently to renew it. Further, the respondent had

previously written to the Tribunal on 21 September 2020 to accede to the withdrawal application, unbeknown to the Tribunal. These facts strongly support the original decision.

17 The claimant then mentions her unemployment benefits. The tribunal does not understand the point she is making but nothing in that part indicates any grounds for recusal. The claimant's ability to pay any costs order was carefully explored by the Employment Tribunal.

18 The claimant then referred to an issue with the Respondent's Response and an apparent allegation that this was filed out of time. There was no application before the Tribunal to deal with any such issue. In any event, the Tribunal file shows that the response was due on 8 May 2019 and was duly filed on that day. The response was accepted by the ET on 8 May 2019 as it was in the proper form and was filed on time.

19 The claimant then mentions a number of management instructions of 20 August 2018. She does not explain what relevance these items have to this application and the tribunal does not understand what she is saying. These points indicate no grounds in support of her application whatsoever.

20 The claimant then mentions the list of issues and discussions with the parties in that respect. She does not explain what relevance these items have to this application and the tribunal again does not understand what she is saying. These points indicate no grounds in support of her application whatsoever.

21 None of the facts set out in the Claimant's application come anywhere near the high bar set for a recusal application.

22 This is plainly not a case in which recusal is appropriate. The application is dismissed.

The Reconsideration Application

The Law

23 Reconsideration of Judgments is governed by Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which state as follows:

> *"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.

72(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.

72(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."

Jurisdiction of the Reconsideration Application

24 I first clarify that the limit of the Claimant's application for reconsideration can only be in respect of paragraph 1 and paragraph 3 of the judgment dated 22 September 2020, and not in respect of paragraph 2 (which left the unfair dismissal claims and the Equality Act claims intact for the time being).

The Relevant Test

25 The test for the Tribunal to apply is whether the interests of justice require a reconsideration of its judgment (Rule 70).

26 This wording is designed to confer a wide discretion on employment tribunals and appears to be consistent with the over-riding objective of the rules to deal with cases fairly and justly as provided for in Rule 2.

27 Nevertheless, an application for reconsideration is not the same as an appeal. It is typically appropriate where something has gone wrong in the administration of justice.

28 Under the old rules of the Tribunal (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004/1861), a party could only apply for a review on the specific grounds listed under (the old) Rule 34:

a. An administrative error had resulted in a wrong decision.
b. The party had not received notice of the proceedings at which the decision was made.
c. The decision was made in the party's absence.
d. There was new evidence available; and/or
e. It was otherwise in the interests of justice to review the decision.

29 As noted by the EAT in ***Outasight VB Ltd v Brown*** **[2015] I.C.R. D11**

> *"The interests of justice long allowed for a broad discretion, albeit one that had to be exercised judicially, which meant having regard not only to the interests of the party seeking reconsideration but also to the interests of the other party to the litigation and to the public interest requirement that there should be a finality to litigation. The 2013 Rules removed the unnecessary specific grounds listed in the earlier Rules. The specified grounds could be seen as having provided examples of circumstances in which the interests of justice might allow a review..*

30 None of the grounds (a) to (d) above apply to the Claimant's application for reconsideration.

31 In so far as the broad "interest of justice" test under (e) require the Tribunal to reconsider the strike out of the automatically unfair dismissal claims on the grounds of public interest disclosures, under rule 72(1), I conclude there is no reasonable prospect of the original decision to strike out being varied or revoked on the grounds that it is plain and obvious that the order fell within the scope of the Employment Tribunal's discretion given that (as found in the Judgment):

The Claimant's claims had no reasonable prospect of success (Rule 37 (a))
The Claimant had demonstrated unreasonable conduct (Rule 37 (b))
The Claimant had repeatedly breached Employment Tribunal Orders (Rule 37 (c)) and/or
The Claimant's claims were not being actively pursued (Rule 37 (d));

32 Under those circumstances, the interests of justice do not point to any need to reconsider paragraph 1 of the Judgment, in particular, no purpose is served by reconsidering striking out claims which the Claimant has twice expressly written to the tribunal asking that they be withdrawn.

The claimant's Letter of 6 October 2020.

33 The claimant made a further request for reconsideration dated 6 October 2020. I shall also address these grounds.

34 The claimant sought to additionally rely upon:

a. Procedural irregularity (Appearance/Response, Case Management orders, Initial Consideration & Applications for case management orders)
b. Apparent bias (as per my email dated 28th September 2020 08:43)
c. Failure to give proper notice (Rule 37/2)
d. Failure to take account of material change and circumstances as advised but not recorded, following the ? (sic) hearing on 19/03/20 - i.e. effective date of dismissal and the content of my email 1st June 2020 13:32 as to whether my dismissal had or had not taken place.
e. And:

As can be seen from the attached, I believe the Respondent's agenda has been used, throughout the proceedings of my case and the evidence/material (enclosed) was not taken into consideration…

35 In short, I do not understand additional point 1. No valid grounds for reconsideration are set out.

36 As to point 2, the allegation of apparent bias in the 28 September email is addressed in detail above. There is no merit in point 2.

37 As to ground 3 this is dealt with above and it has no merit.

38 As to ground 4 I do not understand this point. There is no explanation of what the material change of circumstances is. the email of 1 June 2020 now relied upon was sent before the Preliminary Hearing. There are no new material circumstances identified or new evidence arising after the September Hearing. No grounds for reconsideration arise in respect of this point.

39 The allegation that the claimant's agenda was never properly considered is not explained and is in any event incorrect. All of the papers in the bundle were considered appropriately at each Hearing.

The claimant's letter of 3 October 2020

40 There is a yet further letter sent by the claimant dated 3 October 2020.

41 The only points not already dealt with above is a suggestion that the claimant had presented evidence in a bundle which "blew apart" the respondent's defence. She does not explain how this did so or to which claim. I am unable to identify anything here which would give any possible grounds for reconsideration.

42 The claimant refers to "illegality of management instructions" and to "suppression of evidence", but again does not explain this further. I am unable to identify anything in these paragraphs which would give any possible grounds for reconsideration.

43 The claimant finally adds that she challenges the postponement of the Hearing. No grounds are set out which would suggest a possible basis to require reconsideration of that decision.

44 In any event, there were fundamentally sound reasons to postpone the hearing in view of the findings that the claimant had repeatedly breached Tribunal orders (and was still in breach of those orders) and that such failings were serious and deliberate. Further, that a fair hearing in October could not happen where the respondent had no idea what the claimant's case was in many respects and disclosure and witness evidence exchange could not proceed without this.

45 The appropriate, indeed only reasonable, course of action was to postpone the hearing and relist the matter for a further Preliminary Hearing to deal with the respondent's application for deposit orders and for strike out of certain claims on time limits grounds.

Costs judgment

46 In respect of paragraph 3 of the judgment dated 22 September 2020, the Order in respect of costs, I have considered everything said by the claimant in her letters and having considered all the facts and circumstances, under rule 72(1), there is no reasonable prospect of the original decision in respect of costs (or the amount awarded) being varied or revoked for the same reasons set out above.

47 Accordingly, the claimant's application is dismissed in its entirety.

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Employment Judge Daniels

30 October 2020

Sent to the parties on: 05/11/2020

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For the Tribunal:

Jon Marlowe