EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr D Barrow		**Kellogg, Brown and Root (UK) Limited**

JUDGMENT

The application for reconsideration is refused because: (1) there are no reasonable prospects of the judgment (sent to the parties on 14 December 2020) being varied or revoked; and (2) it has been presented out of time.

REASONS

1. Rule 70 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") provides that an Employment Tribunal may, either on its own initiative or on the application of a party, reconsider a judgment where it is necessary in the interests of justice to do so. On reconsideration, the judgment may be confirmed, varied or revoked.

2. Rule 71 of the ET Rules states that 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.

3. In this case, a reserved judgment was sent to the parties on 14 December 2020. This means that the latest date by which an application for reconsideration needed to be presented at the Tribunal was 28 December

2020.

4. Despite the Claimant succeeding with a number of his claims, he seeks a reconsideration of one claim which failed. This was a claim brought pursuant to s.15 Equality Act 2010 that the Respondent failed to pay the Claimant a bonus under the LTI and under the STI bonus schemes in March 2018. This particular complaint had also been pleaded as a claim of direct disability discrimination and harassment. These claims also failed but the Claimant is not seeking a reconsideration of those determinations, only the determination of the s.15 EQA claim.

5. The Claimant applied for reconsideration by letter dated 22 January 2021. This application was some three weeks out of time. The Claimant sent a more detailed letter on 3 February 2021 setting out its case in more detail.

6. The basis of the Claimant's application appears to be that he presented sufficient evidence to raise a prima facie case from which the Tribunal could conclude that the failure to pay the bonus was an act of discrimination contrary to s.15 EQA, and therefore the burden of proof shifted, for all the reasons stated in Ms Bone's submissions. In the absence of an adequate explanation from the Respondent, the Claimant submits that the Tribunal should have found in the Claimant's favour on this issue.

7. In order to establish a prima facie case of discrimination under S.15 EQA a Claimant must prove that he has been treated unfavourably by the employer. It is also for the Claimant to show that 'something' arose as a consequence of his disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

8. Under Rule 70, a judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows a Tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. The discretion must be exercised judicially, which means having regard not only to the interests of the party seeking the reconsideration, but also the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.

9. The Tribunal's decision on the bonus issue was set out at paragraph 165 of its written reasons, which stated:

> ***The Tribunal concluded that it did not hear sufficient evidence about the terms of the bonus scheme to assess or determine whether the Claimant was entitled to a payment under the scheme and therefore they could not properly assess the validity of the Respondent's reasons for not paying it. The Tribunal was not satisfied that sufficient facts had been proved by the Claimant. The claims brought pursuant to s.13, s.15 and s.26 therefore fail.***

10. The claim in respect of the bonus was pleaded by the Claimant. In his amended particulars of claim, he wrote the following:

> ***<u>Paragraph 6</u>***
> ***The Claimant participated in the Respondent's Short-Term Incentive (STI) and Long-Term Incentive (LTI) Plans. The calculation of payable bonus was in part related to personal performance using objectives agreed in the company-wide annual objective and appraisal system (AIM). The bonuses for the bonus year of 2017 under both the STI and the LTI were payable in March 2018 but were not paid.***
>
> ***<u>Paragraph 87</u>***
> ***The grievance was not properly addressed or considered. Very few findings were made and there was an over-reliance on the testimony of Respondent witnesses with little or no regard given to the Claimant's evidence. The grievances were not considered in sufficient depth, for example the grievances in relation to exclusion and to non-payment of bonus. There was a lack of engagement with the points being raised by the Claimant in his grievance, including a failure to address whether the matters investigated concerned trust and confidence or were properly characterised as conduct.***

11. In his witness statement, Mr Barrow gave the following evidence:

> ***<u>Paragraph 24</u>***
> ***At the beginning of April 2017, Andrew Barrie gave me my enrolment letter for the 2017 STL/LTI bonus scheme in person, as was the custom [p. 294]. He explained that, even though he had been unsuccessful in gaining approval for my promotion to Vice President (level 90 in the organisation structure), he had secured participation in the STI/LTI bonus scheme at the same higher percentages as for Vice President. This was a helpful and welcome gesture and I was grateful that Andrew had advocated for me. I thanked Andrew sincerely for gaining me this potential benefit. It was, of course only a "potential" benefit for the future because the amount depended on all the company, business unit and individual performance factors that fed into the calculation and would only be paid one year later in March 2018. In the event, it was a bonus not paid at all because KBR elected to use its overriding discretion not to pay, even though I was rated sufficiently highly by Andrew to be eligible for payment in my 30 November 2017 annual review.***
>
> ***<u>Paragraph 167</u>***
> ***I was also very concerned that, because the performance rating given by the supervisor feeds into KBR's STI/LTI bonus system and directly adjusts the amount awarded, that I had not had the opportunity to respond adequately to any points where Andrew was potentially not satisfied. Thus, I feared my assessment for STI/LTI bonus payments would be unfairly reduced. The way the meeting was conducted by Andrew, using time on peripheral matters, and then not referring to my itemised objectives as is customary, meant that I did not have the opportunity to give my explanations.***

12. The difficulty for the Claimant in respect of this aspect of his claim is that no

prima facie evidence was presented to the Tribunal from which it could conclude that there had been a breach of s.15 EQA. The mere fact of non-payment (the unfavourable treatment) is not sufficient, on its own, to shift the burden of proof. It is clear from the evidence that the final decision whether or not to award a bonus was made by the Board in Houston and that information provided by Mr Barrie only fed into that decision. The Tribunal saw no documentary evidence of the information before the Board when making the decision. The Tribunal could not decide, on the evidence, whether in fact the Claimant was entitled to a bonus or how much it was. No witness could give direct evidence on this as none of them were the decision makers.

13. I do not consider there is any prospect of the decision being varied or revoked. The interests of justice do not require there to be a reconsideration of the judgment. Accordingly, the application for reconsideration fails and stands dismissed.

14. I considered the reasons for the late application. Of course, I take into account the health of the Claimant, but I do not consider the reasons for the late application are in any event sufficient for me to conclude that it is in the interests of justice to extend the time limits. For this additional reason, the application is refused.

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Employment Judge Hyams-Parish
26 February 2021